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No.

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In The

Supreme Court of the United States

October Term, 1990

TROJAN TECHNOLOGIES, INC. AND KAPPE ASSOCIATES, INC.,

Petitioners,

vs.

COMMONWEALTH OF PENNSYLVANIA and LEROY S. ZIMMERMAN, ATTORNEY GENERAL, COMMONWEALTH OF PENNSYLVANIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether state buy-American legislation that prohibits locally-funded political subdivisions within the state from purchasing foreign steel products violates the commerce clause by rendering the state a market regulator, as to which the Courts of Appeals are in conflict?

2. Whether state buy-American legislation that affirmatively discriminates against foreign commerce violates the commerce clause or is permissible under the market participant doctrine?

3. Whether state buy-American legislation serves a legitimate state interest in protecting United States industry from foreign competition or, as economic protectionism, violates the equal protection clause?

RULE 29.1 LIST

Neither Trojan Technologies, Inc. nor Kappe Associates, Inc. has parent companies, subsidiaries, or affiliates to list pursuant to Rule 29.1.

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No.

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TROJAN TECHNOLOGIES, INC. AND KAPPE ASSOCIATES, INC.,

Petitioners,

vs.

COMMONWEALTH OF PENNSYLVANIA and LEROY S. ZIMMERMAN, ATTORNEY GENERAL, COMMONWEALTH OF PENNSYLVANIA

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners, Trojan Technologies, Inc. and Kappe Associates, Inc., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above-entitled proceedings on October 24, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit (Pollak, J.) is reported at 916 F.2d 903 (3d Cir. 1990), and is reprinted in the appendix hereto, p. 1a, *infra*.

The opinion of the United States District Court for the Middle District of Pennsylvania (Caldwell, J.) is reported at 742 F. Supp. 900 (M.D. Pa. 1990), and is reprinted in the appendix hereto, p. 30a, *infra*.

JURISDICTION

The petitioners brought this suit in the Eastern District of Pennsylvania, invoking federal jurisdiction under 28 U.S.C. § 1331. On the respondents' motion the case was transferred to the Middle District of Pennsylvania.

On January 5, 1990, after the parties filed cross-motions for summary judgment, the Middle District issued an opinion and order denying the petitioners' request for declaratory and injunctive relief.

On appeal pursuant to 28 U.S.C. § 1291, the Third Circuit issued an opinion and order on October 24, 1990, affirming the decision of the district court.

The jurisdiction of this Court to review the judgment of the Third Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8 of the Constitution of the United States:

The Congress shall have the Power . . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Amendment IV, Section 1 of the Constitution of the United States:

No State shall . . . deny any person within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

The Steel Products Procurement Act, Act of March 3, 1978, P.L. 6, No. 3, Pa. Stat. Ann. tit. 73 §§ 1881-87 is reproduced in the appendix hereto at page 41a, *infra,* due to its length.

STATEMENT OF THE CASE

In 1978 the Pennsylvania General Assembly passed the Steel Products Procurement Act (hereinafter "Steel Act"), Act of March 3, 1978, P.L. 6, No. 3, Pa. Stat. Ann. tit. 73 §§ 1881-87. The Steel Act requires all public agencies within the Commonwealth to use American-made "steel products" in all public works projects. The Steel Act applies not only to state agencies, but also to all local governmental entities, including counties, cities, boroughs, townships, school districts, municipalities and authorities. 73 P.S. § 1886. In addition, the Steel Act applies to "all other public bodies, authorities, officers, agencies or instrumentalities, whether exercising a governmental or proprietary function." 73 P.S. § 1886.[1] The stated purpose of the Steel Act

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1. The local governmental entities governed by the Steel Act are substantially autonomous. For instance, counties, cities, boroughs, school districts, and municipalities all have the authority to generate their own revenues and establish (Cont'd)

is to "aid and promote the development of the steel industry of the United States in order to stimulate and improve the economic well-being of the Commonwealth and its people." 73 P.S. § 1883. To this end the General Assembly declared that

> [t]he economy and general welfare of the Commonwealth and its people, as well as the economy, general welfare and national security of the United States, are inseparably related to the preservation and development of the steel industry in the Commonwealth and in the other states of the United States.

73 P.S. § 1883.

Petitioners are Trojan Technologies, Inc. ("Trojan") and Kappe Associates, Inc. ("Kappe").[2] Trojan is a Canadian corporation that manufactures a patented ultraviolet light water disinfection system known as the "UV 2000" (Stipulation of Fact, paras. 1, 3). Kappe is Trojan's exclusive distributor in Pennsylvania. (*Id.*, para. 2).

The UV 2000 is designed for use in potable water plants,

(Cont'd)
governing bodies to administer such funds. *See* Pa. Stat. Ann. tit. 16 § 1770 (Purdon Supp. 1990); Pa. Stat. Ann. tit. 53 § 23104 (Purdon 1957); Pa. Stat. Ann. tit. 53 § 46302 (Purdon 1966 & Supp. 1990); Pa. Stat. Ann. tit. 24 § 6-602 (Purdon 1962); Pa. Stat. Ann. tit. 53 § 306 (Purdon 1974 & Supp. 1990). Municipal authorities, in particular, have substantial contracting authority and finance the construction, maintenance, and operation of sewage treatment facilities through local assessments. Pa. Stat. Ann. tit. 53 § 306.

2. This case came before the District Court for the Middle District of Pennsylvania upon a joint Stipulation of Fact. The Stipulation of Fact is reprinted in the appendix hereto, p. 46a, *infra*.

and has been purchased by several Pennsylvania municipalities and authorities for use in waste water and sewage treatment facilities. (*Id.*, paras. 4-5). The primary components of the UV 2000 are ultraviolet lamps which kill bacteria and microorganisms in the effluent which is discharged from the waste water and sewage treatment facilities. (*Id.*, para. 7). The system also contains a small amount of steel component parts which constitute less than 15% of the UV 2000's total cost. (*Id.*, paras. 8-11).

On July 8, 1988, the Pennsylvania Attorney General's Office sent letters to several municipal authorities requesting information concerning petitioners' compliance with the Steel Act. Three days later a letter was sent directly to Trojan, requesting documentation confirming that the UV 2000 complies with the Steel Act. (*Id.*, para. 20).

On August 8, 1988, Petitioners filed suit against the Commonwealth and the Commonwealth's Attorney General in the Eastern District of Pennsylvania, seeking a declaration of the unconstitutionality of the Steel Act and an injunction against its enforcement. On defendants' motion the case was transferred to the Middle District of Pennsylvania. The parties thereafter filed cross motions for summary judgment.

On January 5, 1990, the District Court (Caldwell, J.) issued an opinion and order denying petitioners' request for declaratory and injunctive relief. The petitioners appealed to the Third Circuit, which affirmed the decision of the District Court on October 24, 1990. The Third Circuit agreed with the District Court's general finding that the Steel Act fell within the market participant exception to the dormant commerce clause.

Unlike the District Court, however, the Third Circuit addressed the issue raised by the fact that the Steel Act applies not only to projects undertaken by state agencies, but also to those

undertaken by local governmental entities, such as municipal authorities, where the state is not a direct market participant. However, the Third Circuit did not understand this distinction to affect its commerce clause analysis. It reasoned that the Commonwealth of Pennsylvania could restrict the contracting authority of such local entities, not because such entities are themselves market participants, but solely because they derive their authority from the state.

In so reasoning, the Third Circuit expressly disagreed with the Seventh Circuit's interpretation of the market participant doctrine in *W.C.M. Window Co. v. Bernardi,* 730 F.2d 486 (7th Cir. 1984). *See Trojan,* 916 F.2d at 911. Consequently, the parameters of the market participant doctrine in the public contracting realm remain unclear.

The Third Circuit also reasoned that its conclusion should not change because the Steel Act discriminated against foreign commerce. This issue was expressly reserved by this Court in *Reeves, Inc. v. Stake,* 447 U.S. 429 (1980), wherein this Court commented:

> We have no occasion to explore the limits imposed on State proprietary actions by the "foreign commerce" Clause or the constitutionality of "Buy-American" legislation. We note, however, that Commerce Clause scrutiny may well be more rigorous when a restraint on foreign commerce is alleged.

Reeves, 447 U.S. at 438 n.9 (citations omitted). Nonetheless, the Third Circuit concluded that the Steel Act survived "even the most searching review" as the concerns animating the foreign commerce clause were not implicated by the Steel Act. *Id.* at 912. The court reasoned that state procurement practices do not raise

conflicts in policy among multiple national sovereigns. Moreover, the court observed that Congress was aware of state activity to restrict procurement of foreign goods, and yet had not imposed a policy of national uniformity. *Id.*

Finally, the Third Circuit summarily rejected petitioners' claim that the Steel Act violated the Equal Protection Clause of the United States Constitution.[3] The court reasoned that this Court's decision in *Metropolitan Life Insurance Co. v. Ward,* 470 U.S. 689 (1985), was inapposite to the case *sub judice* as that case involved taxation, a concern not implicated by the Steel Act. According to the court, the Steel Act did not violate equal protection because it distinguished between groups that were legitimately different. *Trojan,* 916 F.2d at 915.

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3. The Third Circuit also rejected petitioners' claims that the Steel Act was preempted by federal statutes and executive agreements, interfered with the federal government's exercise of the foreign relations power, and was unconstitutionally vague.

REASONS FOR GRANTING THE WRIT

I.

THE THIRD CIRCUIT'S DECISION THAT THE MARKET PARTICIPANT DOCTRINE PERMITS STATES TO REGULATE THE PROCUREMENT POLICIES OF THEIR POLITICAL SUBDIVISIONS IS IN EXPRESS CONFLICT WITH THE SEVENTH CIRCUIT'S INTERPRETATION OF THE MARKET PARTICIPANT DOCTRINE AND EXTENDS THE MARKET PARTICIPANT DOCTRINE BEYOND THE LIMITS SET FORTH BY PREVIOUS DECISIONS OF THIS COURT.

The Third Circuit's decision permitting the Commonwealth of Pennsylvania to regulate the activities of local municipal authorities under the guise of market participation threatens the principles of free trade on which the negative commerce clause is based. Under the Third Circuit's reasoning, the mere grant of authority from a state to a local public entity renders the state a market participant in all activities undertaken by the local public entity. The Third Circuit's analysis expressly rejected the Seventh Circuit's interpretation of the market participant doctrine set forth in *W.C.M. Window Co. v. Bernardi*, 730 F.2d 486 (7th Cir. 1984) (Posner, J.). *See Trojan*, 916 F.2d at 911.

In *Window*, the Seventh Circuit struck down an Illinois preference law which required public works contractors, including those who contracted with local political subdivisions, to hire only Illinois laborers. The Seventh Circuit rejected Illinois' claim—the same claim asserted in the case *sub judice* by Pennsylvania—that the statute was saved from commerce clause scrutiny by the market participant doctrine. The Seventh Circuit reasoned that the crucial distinction between Illinois' preference plan, and those schemes approved by this Court under the market participant

doctrine, was that Illinois applied its preference law not only to itself, but also to local entities. Consequently, the *Window* court held, Illinois acted as "a regulator, telling thousands of local government units that they must not give construction contracts to employers of non-residents." *Window*, 730 F.2d at 495.

The Third Circuit's disagreement with *Window* could be no more direct or complete. *Trojan*, 916 F.2d at 911. The Third Circuit held that local entities are to be fictionalized for commerce clause purposes, and treated as if one and the same with the state, solely because they were created by state legislation.

The Third Circuit's decision extends the market participant doctrine well beyond the narrow contours established by this Court in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983), and *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984). As these decisions make plain, this Court has never suggested that a state's creation of local public entities renders the state a market participant in all activities undertaken at the local level. To the contrary, this Court has required "*direct* state participation in the market" in order for the state to gain market participant status. *Reeves*, 447 U.S. at 436 n. 7 (emphasis added); *see also White*, 460 U.S. at 211 n.7 (the market participant doctrine only permits a state to influence "a discrete, identifiable class of economic activity in which [it] is a major participant.")

Based on this Court's decisions in *Alexandria Scrap* and *White, supra*, the most readily identifiable form of direct, major participation is financial. In *Alexandria Scrap*, the Court held that the State of Maryland could expend state funds to encourage the removal of automobile hulks from Maryland streets and junkyards. In *White*, the Court concluded that the City of Boston could require all construction projects funded in whole or in par-

by the City to be performed by a work force of at least 50% city residents, reasoning that since "the city expended *only its own funds* in entering into construction contracts for public projects, it was a market participant and entitled to be treated as such." *White*, 460 U.S. at 214-215 (emphasis added). The rationale of these holdings is "the long recognized right of a trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *Reeves*, 447 U.S. at 438-439.[4] There is no lawful justification to extend these holdings, as does the Steel Act, to a state's attempt to hamstring the conduct of separate entities, controlled by separate decision-makers, using *separate* funds.

The Third Circuit found that the restraints imposed by the Steel Act do not offend the commerce clause because the affected local entities can informally be thought to be "supplying for the State." *Trojan*, 916 F.2d at 911. This informal analogy flies in

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4. Considerations of state sovereignty also have been cited as supporting the market participant doctrine. In *Reeves*, 447 U.S. at 438 n. 10, for instance, this Court stated that "[c]onsiderations of sovereignty dictate that marketplace actions involving 'integral operations in areas of such traditional governmental functions'—such as the employment of certain state workers—may not be subject even to congressional regulation pursuant to the commerce power. It follows easily that the intrinsic limits of the Commerce Clause do not prohibit state marketplace conduct that falls within this sphere." In support of the foregoing, *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976) was cited. Since this Court's last foray into the arena of market participation, *National League of Cities* was overruled by *Garcia v. San Antonio Metropolitan Transportation Authority*, 469 U.S. 528 (1984). Thus, the foundation upon which the market participant doctrine is built has been substantially weakened, if not totally eradicated. *See Swin Resource Systems, Inc. v. Lycoming County*, 883 F.2d 245, 260 (3d Cir. 1990), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1127, 107 L.Ed. 2d 1033 (1990) (Gibbons, J., dissenting) (the market participant "line of cases rests upon substantially the same notoriously flawed analytic framework of the state-federal relationship made infamous in *National League of Cities*, the companion case to *Alexandria Scrap*").

the face of this Court's admonition that "there are some limits on a state or local government's ability to impose restrictions that reach beyond the immediate parties with whom the government transacts business." *White*, 460 U.S. at 211 n.7. While the Court in *White* found that private contractors were, "in a substantial if informal sense, 'working for the city', " *White*, 460 U.S. at 211 n.7, the executive order in *White* and the Steel Act are breeds apart. In *White*, the city had a substantial connection to the work being performed. The city entered into contracts for the projects at issue, and provided full financial support. In the case *sub judice*, on the other hand, there is no substantial relationship between the Commonwealth and the "discrete, identifiable class of economic activity" taking place on the local level. The private suppliers of local entities are not "supplying for the State". Rather, the private suppliers are supplying for the local entities which pay them.

The upshot is that while local public entities may be considered to be a part of the state for many purposes, it is equally as clear that local public entities cannot be considered a part of the state for all purposes. *See Window*, 730 F.2d at 495.

The Third Circuit's decision affirming the authority of the states to thrust economic protectionist legislation upon local public entities expands market participation well beyond any previous decision of this Court and is directly at odds with the Seventh Circuit's decision in *Window, supra*. The issue is of paramount importance given the tremendous amount of contracting done at the local level across the nation. See *Window*, 730 F.2d at 496. A decision of such far-reaching impact merits review by this Court.

II.

THIS COURT HAS EXPRESSLY RESERVED THE QUESTION OF WHETHER STATE BUY-AMERICAN STATUTES THAT AFFECT FOREIGN COMMERCE ARE SAVED FROM COMMERCE CLAUSE SCRUTINY BY THE MARKET PARTICIPANT DOCTRINE.

In *Reeves, supra,* this Court expressly reserved the question of whether state buy-American legislation is safeguarded from commerce clause scrutiny by the market participant doctrine. *Reeves,* 447 U.S. at 438 n.9. At the same time, the *Reeves* Court observed, and this Court has long held, that restraints on foreign commerce are subject to even greater scrutiny than those on interstate commerce, because of the impact such restraints may have upon the nation as a whole. *Id.; see, e.g., Wunnicke, supra; Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979) (and cases cited therein, *infra* n. 6). Given the formidable burdens on foreign commerce created by the wide-spread enactment of state buy-American legislation,[5] review of the case *sub judice* is merited.

This Court has repeatedly stressed the danger inherent in state forays into foreign affairs. In *Wunnicke,* for instance, a plurality of the Court relied upon heightened foreign commerce clause scrutiny in striking down an Alaska law which required that timber

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5. At least eleven states have buy-American preference statutes in one form or another that restrict the importation of foreign steel. *See* Ala.Code § 39-3-4—§ 39-3-5 (Supp. 1990); Ill.Rev.State. ch. 48, para. 1801-1807 (1986); Ind.Code Ann. § 5-16-8-1—§ 5-16-8-2 (West 1984); Mass.Gen.Laws Ann. ch. 7 § 22 (1986 & Supp. 1990); Md.State Fin. & Proc.Code Ann. § 12-401 § 12-405 (1985); N.J.Stat.Ann. § 40A:11-18 (West Supp. 1990); N.Y. State Fin.Law § 146 (1989); Ohio Rev.Code Ann. § 153.01.1 (1990); Pa. Stat. Ann. tit. 73 § 1881-1887 (Purdon Supp. 1978); R.I.Gen.Laws § 37-2.1-1—§ 37-2.1-5 (1990); W.Va. Code § 5-19-1 § 5-19-4 (1990).

taken from state lands be processed in state prior to export. The Court explained:

> It is a well-accepted rule that State restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny. It is crucial to the efficient execution of the Nation's foreign policy that 'the Federal Government . . . speak with one voice when regulating commercial relations with foreign governments.'

Wunnicke, 467 U.S. at 101 (citing *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976); *Japan Line, supra*).

Similarly, in *Japan Line, supra*, the Court struck down a California ad valorem property tax, as applied to Japanese shipping companies' cargo containers which were used exclusively in foreign commerce. The Court found that the tax could frustrate the achievement of federal uniformity in several ways. For instance, the Court noted that if a novel state tax created an asymmetry in the international tax structure, foreign nations disadvantaged by the levy could retaliate against American-owned instrumentalities generally, "so that the Nation as a whole would suffer." *Id.* at 450; *see Brown v. Maryland*, 25 U.S. 419, 446-448 (1827); *Chy Lung v. Freeman*, 92 U.S. 275, 279 (1876). Moreover, if other States followed California's example, various instrumentalities of commerce could be subjected to varying degrees of multiple taxation, a result that would plainly prevent the Nation from "speaking with one voice, in regulating foreign commerce. *Id.*[6]

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6. The Court cited numerous cases stressing the need for uniformity in dealing with foreign nations. *See, e.g., Buttfield v. Stranahan*, 192 U.S. 470, 492-493 (1904) ("exclusive and absolute" power of Congress over foreign (Cont'd)

Despite this precedent, the Third Circuit quickly dismissed the impact of buy-American legislation upon foreign commerce. The central concern, according to the Third Circuit, was whether the Steel Act impaired federal uniformity in an area where federal uniformity was essential.[7] Reasoning that Congress is aware of state activity to restrict the procurement of foreign goods, yet has not imposed a policy of national uniformity, the Third Circuit concluded that state procurement policy was not an area in which federal uniformity was essential. *Trojan*, 916 F.2d at 912.

The Third Circuit's conclusion cries out for review. It confuses dormant commerce clause analysis, and it ignores the important considerations this Court has stressed as being applicable to the review of state legislation impacting foreign commerce.

First, contrary to the position asserted by the Third Circuit, federal approval of state buy-American legislation cannot be inferred from Congressional silence. Implicitly, the Third Circuit reasoned that if Congress was disturbed by state buy-American policies, it could address and eliminate the problem. Having not

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(Cont'd)

commerce); *Bowman v. Chicago & N.R. Co.*, 125 U.S. 465, 482 (1888) ("It may be argued [that] the inference to be drawn from the absence of legislation by Congress on the subject excludes state legislation affecting commerce with foreign nations more strongly than that affecting commerce among the States. Laws which concern the exterior relations of the United States with other nations and governments are general in nature, and should proceed exclusively from the legislative authority of the nation"); *Henderson v. Mayor of New York*, 92 U.S. 259, 273 (1876) (regulation "must of necessity be national in its character" when it affects "a subject which concerns our international relations, in regard to which foreign nations ought to be considered and their rights respected").

7. The Third Circuit identified multiple taxation as another concern underlying the foreign commerce clause. However, the court summarily dismissed this concern as the Steel Act does not involve taxation.

done so, Congress somehow voiced its approval of state buy-American legislation.

This reasoning stands dormant commerce clause analysis on its head, and is based upon a premise previously rejected by this Court. In *Japan Line, supra*, appellees contended that any problems created by California's tax could be cured by congressional action or by international agreement. In finding "no merit in this contention" this Court explained:

> The premise of appellees' argument is that a State is free to impose demonstrable burdens on commerce, so long as Congress has not preempted the field by affirmative regulation. But it has long been 'accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation . . . affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests.'

Japan Line, 441 U.S. at 454. The Court further observed that appellees' argument defeated, rather than supported, the cause it aimed to promote:

> For to say that California has created a problem susceptible only of Congressional—indeed, only of international—solution is to concede that the taxation of foreign-owned containers is an area where uniform federal rule is essential. California may not tell this Nation or Japan how to run their foreign policies.

Id. at 455.

Thus, the absence of a uniform federal policy with respect to state buy-American legislation proves nothing; Congressional silence is not tantamount to Congressional approval.

Second, rather than endorsing silence as approval, this Court has held that *express* Congressional approval is required before the states are permitted to impose burdens upon interstate or foreign commerce. *Wunnicke, supra; see Sporhase v. Nebraska ex rel. Douglas,* 458 U.S. 941, 960 (1982) (where this Court declined to find Congressional authorization for state-imposed burdens on interstate commerce in ground water despite 37 federal statutes and a number of interstate compacts that demonstrated Congress' deference to state water laws); *New England Power Co. v. New Hampshire,* 455 U.S. 331 (1982).

Thus, in *Wunnicke, supra,* a plurality of this Court struck down Alaska's in-state processing requirement despite the existence of "parallel" federal legislation which approved such restrictions on federal owned lands. The Court rejected the argument that the Alaska policy was authorized by the federal policy, because such authorization was not expressly stated. The Court reasoned:

> A rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce.

Wunnicke, 467 U.S. at 93. The Court found this need for affirmative approval "heightened by the fact that Alaska's policy has substantial ramifications beyond the Nation's borders. The need for a consistent and coherent foreign policy, which is the exclusive responsibility of the Federal Government, enhances the

necessity that Congressional authorization not be lightly implied." *Id.* at 93 n. 7.

Third, even assuming, *arguendo*, that Congressional silence manifests federal approval of state regulation[8] Congress *has* articulated the need for a uniform federal policy with respect to the importation of foreign steel. The Steel Import Stabilization Act ("Stabilization Act"), *supra*, evinces the clear intent by Congress to place control of steel import policy firmly within the hands of the Executive. In enacting the Stabilization Act, Congress found that a "national policy" was necessary for the steel industry to compact the effects of unfair trade practices. Sec. 802(a)(4). Congress reasoned that the "full and effective implementation of the national policy for the steel industry" would "substantially improve the economy and employment in both the steel and iron ore producing sectors." Sec. 802(a)(6).

Thus, although the Pennsylvania General Assembly believes that the promotion of the "development of the steel industry of the United States" will be accomplished through such protectionist legislation as the Steel Act, Congress has itself perceived the threat of steel imports to be a national concern and has empowered the President—not the individual states—to deal with the problem.[9]

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8. The Third Circuit expressly found that the United States-Canada Free Trade Agreement, January 2, 1988, 27 I.L.M. 281, the Trade Agreements Act of 1979, Pub.L. 96-39, 93 Stat. 144, 19 U.S.C.S. § 2501-2581 (Law. Co-op. 1983 & Supp. 1990), the Agreement on Government Procurement (implemented pursuant to the Trade Agreements Act of 1979), and the Steel Import Stabilization Act, P.L. 98-573, Title VIII §§ 801-808, 98 Stat. 3043-47, codified at 19 U.S.C.S. § 2253 note (Law. Co-op. Supp. 1990), collectively did not contain a clear statement of acquiescence in state buy-American statutes. *Trojan*, 916 F.2d at 909-910 n. 10.

9. In addition to the Stabilization Act, Congress has directed a substantial amount of attention to areas implicated by the Steel Act. *See* United States-

(Cont'd)

Finally, the Third Circuit completely failed to address one of the major concerns underpinning the foreign commerce clause, stressed in *Japan Line, supra:* the danger of retaliation by foreign nations which, by necessity, would be directed against the Nation as a whole. This threat of retaliation is plainly implicated by state procurement policies. Foreign nations who are unable to do business with Pennsylvania public entities may retaliate, not only against Pennsylvania, but against the Nation as a whole. This threat of economic retaliation is made all the more real by the proliferation of state buy-American legislation. *See supra,* n.5. This significant threat, and the national impact of discriminatory state restraints on foreign commerce, justify a review of the Third Circuit's decision by this Court.

III.

THE THIRD CIRCUIT'S DECISION THAT STATE BUY-AMERICAN LEGISLATION DOES NOT VIOLATE EQUAL PROTECTION IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT HOLDING THAT ECONOMIC PROTECTIONISM IS NOT A LEGITIMATE STATE PURPOSE UNDER THE EQUAL PROTECTION CLAUSE.

The Steel Act strives to promote the United States steel industry by barring foreign made steel products from every public works project in the Commonwealth. Such blatant attempts at economic protectionism have uniformly been struck down by this

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(Cont'd)

Canada Free Trade Agreement; the Agreement on Government Procurement; the Stabilization Act, and the Trade Agreements Act of 1979. *Compare Wunnicke,* 467 U.S. at 101, where this Court found Alaska's in state processing requirement particularly inappropriate as it implicated an area in which Congress had directed substantial attention. Interestingly, this "substantial attention" came in the form of federal legislation which, Alaska argued, authorized Alaska's scheme.

Court under both commerce clause and equal protection analysis. *See Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263 (1984); *Metropolitan Life Insurance Company v. Ward,* 470 U.S. 869 (1985). The Third Circuit's decision legitimizes the very sort of parochial and discriminatory state policies that the equal protection clause was intended to prevent.

In *Metropolitan Life,*[10] this Court held that under the equal protection clause the "promotion of domestic business within a State, by discriminating against foreign corporations that wish to compete by doing business there, is not a legitimate state purpose." *Id.* at 880. The Third Circuit justified its refusal to apply this holding to the case *sub judice* by reasoning that *Metropolitan Life* was limited to the type of discriminatory tax scheme presented in that case. *Trojan,* 916 F.2d at 915 [citing *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System,* 472 U.S. 159 (1985)]. Moreover, the court stated that "the Equal Protection Clause permits economic regulation that distinguishes between groups that are legitimately different". *Trojan,* 916 F.2d at 915 [quoting *National Bancorp,* 472 U.S. at 180 (O'Connor, J., concurring)].

This reasoning is erroneous, and directly contravenes this

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10. In *Metropolitan Life* this Court struck down an Alabama statute which imposed a substantially lower tax rate on domestic insurance companies than on out of state insurance companies. The Alabama statute could not be attacked under the Commerce Clause because Congress had expressly authorized state regulation of the insurance industry. Nonetheless, this Court concluded that "[e]qual protection restraints are applicable even though the *effect* of the discrimination . . . is similar to the type of burden with which the Commerce Clause would also be concerned." *Id.,* 470 U.S. at 881. Similarly, a state's status as a market participant does not immunize it from equal protection attack. *See Alexandria Scrap, supra* (upholding Maryland's market participant scheme because it bore a rational relationship to Maryland's legitimate purpose to clean up its own environment).

Court's decisions in *Metropolitan Life* and *Northeast Bancorp.*

First, in *Northeast Bancorp,* this Court distinguished *Metropolitan Life* in upholding under equal protection attack state statutes that excluded bank holding companies from some states while admitting others. In so doing, this Court focused on the fact that "banking and related financial activities are of profound local concern." *Northeast Bancorp,* 472 U.S. at 177. These "profound local concerns" provided the legitimacy for the state statutes.

The rationale supporting *Northeast Bancorp* has little relevance in the case *sub judice.* First, the Steel Act does not address a matter of "profound local concern". The purpose of the Steel Act is to promote the United States steel industry. The promotion of the steel industry is a matter of national and not local concern, as evidenced by Congress' enactment of the Steel Import Stabilization Act, *supra.*

Second, in *Northeast Bancorp* "the states in question . . . [were] not favoring local corporations at the expense of out-of-state corporations". *Northeast Bancorp,* 472 U.S. at 177. This is not true of the Steel Act. The stated purpose of the Steel Act is to promote the United States steel industry by barring from all public works projects any entity which deals with foreign steel manufacturers. The Steel Act thus attempts to promote a national industry at the expense of a foreign industry.

Finally, the fact that the Steel Act does not implicate the taxing power misses the point. The *Metropolitan Life* decision was based in large measure upon *Western & Southern Life Ins. Co. v. State Board of Equalization of California,* 451 U.S. 648,

667-668 (1981)[11], where this Court held:

> We consider it now established that, whatever the extent of a State's authority to exclude foreign corporations from doing business within its boundaries, that authority does not justify imposition of more onerous taxes *or other burdens* on foreign corporations than those imposed on domestic corporations . . .

(emphasis added).

Thus, this Court has never held that *only* discriminatory tax schemes, like those presented in *Metropolitan Life,* violate equal protection. To the contrary, when a state statute imposes burdens on foreign businesses that are more onerous than those on domestic businesses, and the imposition of such burdens do not further legitimate state interests, the statute violates equal protection.

The burdens imposed by the Steel Act on foreign industries are intentional, direct, and, for a company that manufactures products for use by municipal authorities, virtually complete. Review of the Third Circuit's decision is required by this Court

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11. In *Western & Southern Life Ins. Co.*, this Court upheld a California statute which imposed a retaliatory tax upon on foreign insurers when the insurer's state of incorporation imposed higher taxes on California insurers doing business in that state. This Court observed that the principal purpose of retaliatory tax laws is to promote the interstate business of domestic insurers by deterring other States from enacting discriminatory taxes. *Id.* at 668. According to this Court, this was a legitimate state purpose. *Id.* at 671. While such retaliatory state measures may be legitimate in the context of interstate commerce, they clearly have no place in foreign commerce. In fact, this concern over foreign retaliation is one of the factors motivating heightened foreign commerce clause scrutiny. *See Japan Line,* 441 U.S. at 450. Moreover, as applied to foreign commerce, such laws would impermissibly cast courts of law as arbiters of foreign policy. *See Zschernig v. Miller,* 389 U.S. 429 (1968).

to clarify the extent of state authority to promote domestic industries through such economic protectionist legislation.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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January 21, 1991

APPENDIX A — OPINION OF THE COURT OF APPEALS

Filed October 24, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-5057

TROJAN TECHNOLOGIES, INC. and KAPPE ASSOCIATES, INC.,

Appellants,

v.

COMMONWEALTH OF PENNSYLVANIA and LEROY S. ZIMMERMAN, ATTORNEY GENERAL, COMMONWEALTH OF PENNSYLVANIA,

Appellees

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(M.D. Pa. No. 89-0364)

Argued August 10, 1990

BEFORE: STAPLETON and GREENBERG,
Circuit Judges and
POLLAK*, *District Judge*

(Filed October 24, 1990)

Paul A. Logan (Argued)
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* The Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

POLLAK, *District Judge.*

This case presents the question whether the Pennsylvania Steel Products Procurement Act ("Steel Act"), Act of March 3, 1978, P.L. 6, No. 3, Pa. Stat. Ann. tit. 73, §§ 1881-87, is unconstitutional. The grounds of challenging the Steel Act are several: it is contended that the Steel Act (1) is preempted by various federal statutes

and executive agreements regulating foreign commerce; (2) unconstitutionally burdens foreign commerce; (3) interferes with the federal government's exercise of the foreign relations power; (4) is unconstitutionally vague; and (5) violates the equal protection clause.

I. *Background*

The essential facts are not in dispute. The Steel Act requires suppliers contracting with a public agency in connection with a public works project to provide products whose steel is American-made. Pa. Stat. Ann. tit. 73, § 1884. "Public agency" is defined broadly to include not only state agencies but all local governmental entities including "all municipal . . . authorities . . . created or organized by any county, city, borough [or] township." Pa. Stat. Ann. tit. 73, § 1886.[1] The range of steel products affected is similarly exhaustive, covering "products rolled, formed, shaped, drawn, extruded, forged, cast fabricated or

1. The full definition of "public agency" is

> (1) the Commonwealth and its departments, boards, commissions and agencies;
>
> (2) counties, cities, boroughs, townships, school districts, and any other governmental unit or district;
>
> (3) the State Public School Building Authority, the State Highway and Bridge Authority, and any other authority now in existence or hereafter created or organized by the Commonwealth;
>
> (4) all municipal or school or other authorities now in existence or hereafter created or organized by any county, city, borough, township or school district or combination thereof; and
>
> (5) any and all other public bodies, authorities, officers, agencies or instrumentalities, whether exercising a governmental or proprietary function.

Pa. Stat. Ann. tit. 73, § 1886.

otherwise similarly processed . . . by the open hearth, basic oxygen, electric furnace, Bessemer or other steel making process." *Id.* at § 1884.

Payments made in violation of the Act are "recoverable directly from the contractor, subcontractor, manufacturer or supplier who did not comply with" the Act. *Id.* at § 1885(a). Willful violators of the Act are prohibited from bidding on public agency contracts for five years. *Id.* at § 1885(b).

Appellant Trojan is a Canadian corporation that manufactures a "UV-2000" ultraviolet light water-disinfection system. Stipulation of Fact, ¶ 1. Appellant Kappe is Trojan's exclusive distributor in Pennsylvania. *Id.*, ¶ 2. The basic UV-2000 contains from four to eight ultraviolet lamps, located in a "UV Module." The UV Module, in turn, is housed in a stainless steel frame. Steel is also found in a stainless steel control box that houses many of the devices for monitoring the UV-2000's operation. The steel components constitute less than 15% of the UV-2000's total cost. *Id.*, ¶ 7-11.

The UV-2000 has applications in industry, potable water plants and residential use. Several Pennsylvania municipalities and authorities have purchased the UV-2000 and installed it at waste-water and sewage-treatment facilities. *Id.*, ¶ 4-5. On July 8, 1988, the Pennsylvania Attorney General's Office sent letters to several municipal authorities requesting information concerning compliance with the Act. On July 11, 1988, the Attorney General's Office sent a letter directly to Trojan, requesting documentation confirming that its ultraviolet disinfection system complies with the Act. Trojan has not supplied any such documentation. While the Attorney General sought such information in order to ensure compliance

with the Steel Act, there has been no final determination that the Act has been violated, nor have any sanctions been imposed. *Id.*, ¶ 20.

On August 8, 1988, Trojan and Kappe filed this suit against the Commonwealth and the Commonwealth's Attorney General in the District Court for the Eastern District of Pennsylvania, seeking a declaration of the unconstitutionality of the Steel Act and an injunction against its enforcement. On defendants' motion the case was transferred to the Middle District of Pennsylvania. The parties filed cross motions for summary judgment. On January 5, 1990, Judge Caldwell issued a memorandum and order denying Trojan's request for declaratory and injunctive relief. Appellants took this appeal. At the invitation of this court the United States has submitted a brief as *amicus curiae*.[2] We affirm.

II. *The Preemption Challenge*

In accordance with the principle that statutory questions should be considered first in order to avoid possibly needless constitutional inquiry, we turn initially to appellants' claim that the Steel Act is preempted by a variety of federal statutes and trade agreements.

Federal law may preempt state law in any of three ways. *Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Commission*, 837 F.2d 600, 605 (3d Cir.) *cert. denied* 109 S. Ct. 365

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2. The *amicus* brief supports the district court's decision on the preemption, commerce clause, and foreign affairs power issues; the brief takes no position on the vagueness and equal protection challenges, on the theory that the federal government has no institutional interest or expertise relevant to those claims.

(1988). First, Congress may explicitly occupy a regulatory field. *Id.* at 606. Second, preemption may occur when Congress completely, although not explicitly, occupies an entire field of regulation, leaving no room for the states to supplement federal law. *Id.*; *Schneidwind v. ANR Pipeline Co.*, 485 U.S. 293, 299 (1988). Finally, federal law preempts its state counterpart when simultaneous compliance with both state and federal law is "impossible or when state law stands as an obstacle to accomplishment and execution of the full purposes and objectives of Congress." *Kentucky West Virginia Gas*, 837 F.2d at 606 (citations omitted). Because of federalism concerns, it is presumed that Congress ordinarily does not intend to displace existing state authority. See *Tafflin v. Levitt*, 110 S. Ct. 792, 795 (1990). Further, "[w]here . . . the field which Congress is said to have preempted has been traditionally occupied by the States," Congressional intent to preempt must be "clear and manifest." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). State procurement policy would appear to be such a field.

Appellants contend that the United States-Canada Free Trade Agreement, the Agreement on Government Procurement, the Steel Import Stabilization Act of 1984, the Trade Act of 1984 and the Trade Agreements Act of 1979 require an inference of Congressional intent to preempt state-level "buy-American" statutes such as Pennsylvania's. Appellants argue both that each individual federal enactment justifies an inference of preemption, and that the cited acts and agreements *in toto* reveal an attempt to develop a comprehensive scheme that leaves no room for supplementary state activity.

A. *International Agreements*

1. *United States-Canada Free Trade Agreement*

The United States-Canada Free Trade Agreement, 27 I.L.M. 281, — an executive agreement both negotiated and implemented pursuant to statutory directives — became effective January 1, 1989.[3] Chapter 13 of that agreement deals specifically with the issue of government procurement in areas of trade between the two nations. The chapter commits the parties to "actively strive to achieve, as quickly as possible, multilateral liberalization of international government procurement policies." Article 1301, Free Trade Agreement. The Agreement's implementing legislation provides that "[t]he provisions of the [Free Trade] Agreement prevail over — (A) any conflicting State law . . . [and] any conflicting application of any State law to any person or circumstance. . ." Implementation of the United States-Canada Free-Trade Agreement, Title I, Section 102. Appellants contend that the Steel Act runs counter to the Agreement's stated purpose of liberalizing government procurement policies and thus is preempted.

We are unpersuaded. The major difficulty with appellants' position is that the language chiefly relied on —- "strive to achieve . . . multilateral liberalization" —- is hortatory rather than mandatory. Cf. *Wardair Canada, Inc. v. Florida*

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3. The Agreement was negotiated by the President under authority of 19 U.S.C. § 2112(b). The Agreement was entered into on January 2, 1988 and the United States-Canada Free Trade Agreement Implementation Act was approved by Congress on September 28, 1988, Pub. L. 100-449, 102 Stat. 1851, as amended by Pub. L. 101-207, § 1(b), 101 Stat. 1833, reprinted at 19 U.S.C. § 2112 [statutory notes].

Dept. of Revenue, 477 U.S. 1, 10 (1986) (distinguishing "international *aspiration*" and "the *law* as it presently stands," refusing to enforce the "aspiration" to strike a state tax) (emphasis in the original). Indeed, rather than explicitly preempting state buy-American statutes, the Agreement seems tacitly to acknowledge and permit them. Article 1304 provides that "[t]he obligations of this Chapter shall apply only to procurements specified in Code Annex I." The Annex then specifies fifty-four *federal* agencies for coverage. Implicit in this specific designation omitting the states is Congress' acquiescence in, if not endorsement of, state buy-American statutes. Cf. *Wardair*, 477 U.S. at 12. The legislative history makes this point clear, noting that "[a]lthough discussions in the current version of the agreement were not successful in addressing barriers below the level of the Federal Government in either country, it is the Committee's understanding that the two governments will return to this subject at a later point." S. Rep. No. 100-509, 100th Cong., 2d Sess., at 65 (report of the Senate Committee on Government Affairs).[4] Appellants provide no evidence that any subsequent negotiations have revisited and resolved questions about sub-national barriers. In the meantime, it is untenable to suggest that an agreement unsuccessful in addressing sub-national trade barriers has preempted a state buy-American statute.

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4. Canadian commentators agree, see e.g., J. Johnson & J. Schachter, *The Free Trade Agreement, A Comprehensive Guide*, § 4.2(3) (1988) (United States-Canada Free Trade Agreement Chapter on Government Procurement "is based on the [GATT] Procurement Code," discussed infra, from which "all provincial, state and local government procurement is excluded").

Appellants' position also overlooks Congress' substantial concern with *fair* trade, as distinct from *free* trade. Article 1301, on which appellants also rely, speaks of achieving "*mutually* beneficial trade opportunities in government procurement based on the principles of non-discrimination and *fair* and open competition." (emphasis added).[5] The legislative history notes Congress' concern "about the negative effect that provincial procurement barriers can have on the ability of U.S. exporters to compete for government procurement contracts in Canada." S. Rep. No. 100-509, 100th Cong., 2d Sess., at 65 (report of the Senate Committee on Government Affairs).[6] Given Congress' evident

5. *See also*, the Trade Agreements Act of 1974, among the purposes of which is "to harmonize, reduce, and eliminate barriers to trade on a basis which assures substantially equivalent competitive opportunities for the commerce of the United States," 19 U.S.C. § 2102(2) and the Trade Agreements Act of 1979, where one "objective [is to] encourage countries to become parties to the [GATT Government Procurement Code] and provide appropriate reciprocal competitive government procurement opportunities to United States products . . . ." 19 U.S.C. § 2512(b).

6. It is also to be observed that achieving United States-Canadian reciprocity in sub-national government procurement may require more than national legislation. While it is clear that, on the United States' side, Congress would have authority to act preemptively in this area as an exercise of its power over foreign commerce, it is not at all clear that the Canadian Parliament has cognate authority. In Canada the allocation of authority between federal and provincial institutions, including the treaty power, is governed by §§ 91 (federal powers), 92 (provincial powers) and 132 (treaty power) of the Canadian Constitution, British North America Act, 1867, 30 & 31 Victoria c. 3 (consolidated with amendments), substantially amended by the Constitution Act, 1982, Can. Rev. Stat. 1985, Apendix II, No. 44. Under the allocation of authority established by these sections, it may be that a

concern with achieving *reciprocal* trade barrier reduction it would be anomalous to draw the inference that the executive and legislative branches intended to require the *unilateral* elimination of state trade barriers. The United States-Canada Free Trade Agreement does not constitute such a mandate.

2. *Agreement on Government Procurement*

The Agreement on Government Procurement was entered into in 1979 pursuant to the Tokyo Round of GATT negotiations. It was implemented by the President in 1982, pursuant to his authority under the Trade Agreements Act of 1979, 19 U.S.C. §§ 2511-18 and under 3 U.S.C. § 301. The Agreement contains detailed rules on the way in which government procurement contracts are to be awarded, including that governments will provide foreign nationals "treatment no less favorable than . . . that accorded to domestic products and suppliers." Agreement on Government Procurement, Art. II.

Like the United States-Canada Free Trade Agreement, however, the Government Procurement

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federal undertaking to impose constraints on provincial purchasing policies would require approval of the individual provinces. See, *Attorney-General of Canada v. Attorney-General of Ontario* (the *Labour Conventions* case), [1937] A.C. 326, [1937] 1 D.L.R. 673 (Atkins, L.). See also, P. Hogg, *Constitutional Law of Canada*, 249-54 (2d ed. 1985).

It also appears that Canadian provinces may enjoy rights similar to those accorded states under the market participant doctrine. See *Smylie v. The Queen* (1900) 31 O.R. 202, 222-23 (Ont. C.A.) (province has the power under § 92 to dictate the terms under which it disposes of its own property, thus permitting province to prohibit the harvest of timber from provincial lands unless harvester pledges to have timber processed in Canada before export). See also, P. Hogg, supra, at 570-74.

Agreement only purports to cover fifty-four *federal* agencies. Furthermore, the Government Procurement Agreement contains express language suggesting that national governments will attempt to *persuade* local governments of the benefits of free trade.[7] If anything, then, the President and Congress have *disavowed* any intent to supersede such state legislation. The Agreement's legislative history confirms this view. See *Statement of Administrative Action*, printed in H.R. Doc. No. 96-153, 96th Cong., 1st Sess. 388, 466, *reprinted in* 1979 *U.S. Code Cong. & Admin. News*, 665, 726-27 ("The Agreement does *not* cover . . . all purchases by States and local governments, including purchases by States and local authorities with federal funds") (emphasis in the original); cf. *id.* at 479, *reprinted in* 1979 *U.S. Code Cong. & Admin. News* at 737-38 ("[p]urchases by state and local governments are not covered since the Agreement applies only to federal agencies specifically listed . . . [t]he Agreement obligates the U.S. government only to inform regional and local governments of the principles and rules of the Agreement"). In short, the Agreement on Government Procurement demonstrates no intent to preempt state buy-American statutes.

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7. Article I, ¶ 2 provides, "The Parties shall inform their entities not covered by this Agreement and the regional and local governments and authorities within their territories of the objectives, principles and rules of this Agreement, in particular the rules on national treatment and non-discrimination, and draw their attention to the overall benefits of liberalization of government procurement."

B. *Statutes*

Appellants' preemption arguments also invoke the Steel Import Stabilization Act, P.L. 98-573, Title VIII, §§ 801-808, 98 Stat. 3043-47, codified at 19 U.S.C.A. § 2253 (Supp. 1990), the Trade Act of 1974, Pub. L. 93-618, 88 Stat. 1978, (codified as amended in scattered sections of 5 U.S.C., 19 U.S.C. and 31 U.S.C.), and the Trade Agreements Act of 1979, Pub. L. 96-39, 93 Stat. 144 (codified as amended primarily in scattered sections of 19 U.S.C.). But these arguments, too, are wide of the mark. Much of the statutory language is either aspirational or so general as to be insufficient to justify a finding of preemption. See, e.g., Steel Import Stabilization Act, Sec. 802(a)(4) (describing a "national policy" for the steel industry); Trade Act of 1974, 19 U.S.C. § 2102(1), (2) (Supp. 1990) (Act's purpose is to promote "open and nondiscriminatory world trade" and "to harmonize, reduce, and eliminate barriers to trade"); Trade Agreements Act of 1979, 19 U.S.C. § 2502(2) (Act's purpose is to promote "an open world trading system").

Those statutory provisions that are relatively specific fall short of establishing a comprehensive federal scheme or of revealing a direct conflict with the Steel Act. The Steel Import Stabilization Act, for example, establishes a mechanism for imposing quantitative limits on United States' steel imports. It does not, however, include regulations of price, quality or other terms of trade that if present would indicate comprehensive regulation. Similarly, the Trade Agreements Act, in making reference to the effects of state policy on international trade, goes only so far as to announce the "sense of Congress" that state

agencies should not use *standards-related* activity[8] to create "unnecessary obstacles" to foreign trade. § 403, codified at 19 U.S.C. § 2533. We think it unlikely that a "sense of Congress" is sufficient to preempt a state statute establishing a standards-related barrier;[9] it certainly is insufficient to preempt other types of trade restrictions. Indeed, the cited provision suggests that Congress is aware of state activities affecting foreign trade and has decided to confine itself to persuasive appeals rather than mandatory preemption.

Such an approach is unsurprising given the Congress' previously mentioned concern that any reductions in barriers to trade be accomplished on a reciprocal basis. That concern has been expressed during the adoption of the agreements discussed above and during the adoption of the three trade acts relied on by appellants. See, e.g., Steel Import Stabilization Act, Sec. 802(a)(4) ("vigorous efforts . . . needed to eliminate . . . unfair trade practices"); Trade Act of 1974, § 2, codified at 19 U.S.C. § 2102(2), (3) (goal is "to assure[] substantially equivalent competitive opportunities for the commerce of the United States" and "establish fairness and equity in international trading relations"). Absent assurances of a reciprocal commitment by our trading partners, it appears that the Congress is

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8. "Standards-related activity" is a buyer's activity establishing performance and other technical criteria for goods that it will purchase, and for testing those goods to insure that they meet the standards established. See 19 U.S.C. § 2532.

9. See L. Tribe, *American Constitutional Law*, § 6-26, at 489 (2d ed. 1988) ("broad and abstract federal goals [are] given scant preemptive effect").

as yet unwilling to preempt state buy-American legislation.

In sum, federal policy as reflected in the two international agreements and three statutes has left unadulterated a state's authority to enact buy-American legislation. These agreements and statutes do not constitute a comprehensive scheme so pervasive that it must exclude all state action with respect to foreign steel nor are they otherwise sufficient to support an inference of Congressional intent to preempt state buy-American legislation. The federal policy appears to have been the result of an explicit negotiating strategy, a strategy that permits such sub-national legislation pending sufficient trade concessions or assurances of mutuality on the part of our international trading partners. We offer no comment on the wisdom of that strategy except to say that courts should leave such matters to the responsible arbiters, Congress and the Executive. If Congress and the Executive conclude that a state statute such as the Steel Act is antithetic to the national interest, they have full authority to foreclose its continuing operation. But no such authority has yet been exercised.

II. *Commerce Clause Challenge*

Article I, § 8 of the United States Constitution provides that "[t]he Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States." It is well established that this affirmative grant may sometimes prohibit state regulatory activity, even absent preemptive federal legislation. *Swin Resource Systems, Inc. v. Lycoming County*, 883 F.2d 245, 248 (3d Cir. 1989) (citing *Cooley v. Brd. of Wardens*, 53 U.S. (12 How.) 299, 319 (1852)). In particular, the "negative commerce clause," or "dormant commerce clause" as this residual constraint is often called, prohibits

many discriminatory state regulations designed to promote local enterprise at the expense of that from other states or from foreign countries. The general rationale underlying the negative commerce clause is that it prevents the economic balkanization of the United States into fifty separate and impenetrable markets. *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979).[10]

However, the Supreme Court has also made clear that "a state or state subdivision that acts as a market participant, rather than a market regulator 'is not subject to the restraints of the Commerce Clause.'" *Swin Resources*, supra, at 249 (quoting *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 208 (1983)). Put roughly, the market participant doctrine protects states when they are acting as parties to a commercial transaction rather than (as, for example, when adopting a tax scheme) they are acting as market regulators. See *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1980). Appellees, in arguing that the commerce clause does not invalidate the Steel Act, claim the protection of the "market participant doctrine." However, the Supreme Court has expressly reserved the

10. It is also well established that state enactments that might otherwise be barred by the dormant commerce clause are permissible if sanctioned by Congress. See, e.g. *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 434 (1945). The agreements and statutes discussed in Part I of this opinion seem to us to come exceedingly close to providing such approval. If such were the case, there would be no dormant commerce clause issue to be decided as the state legislation would have received a Congressional imprimatur. Cf. *Wardair Canada v. Florida Dept. of Revenue*, 477 U.S. 1, 9-13 (1986). However, since these agreements and statutes do not contain a clear statement of acquiescence in state buy-American statutes, we will go on to consider the commerce clause challenge.

question of whether state buy-American statutes that affect foreign commerce violate the commerce clause, or are permissible under the market participant doctrine or on other grounds. *Id.* at 437, n. 9.[11]

To analyze appellants' commerce clause challenge, the first question we face is whether the state, in enacting and enforcing the Steel Act, is a market regulator or a market participant. We are satisfied that if Pennsylvania is only a participant, the inquiry is at an end, *White*, 460 U.S. at 210; for the reasons developed below, we are convinced that with respect to state buy-American statutes there can be no commerce clause intrusion even in a foreign commerce context where there is no attempt to regulate.[12]

Appellants argue that market participant status is unavailable to Pennsylvania because the Commonwealth is not a buyer of appellants' disinfection system. Instead, appellants stress that their customers are local governmental units distinct from the Commonwealth. Appellants contend that in controlling the purchases of these local entities, the Commonwealth is regulating

11. Two state courts have come to competing conclusions on this issue. Compare *Bethlehem Steel Corp. v. Board of Commissioners*, 276 Cal. App. 2d 221 (1969) with *K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm'n*, 381 A.2d 774 (1977), appeal dismissed 435 U.S. 982 (1978).

12. A determination that Pennsylvania is acting as a regulator would not, standing alone, be sufficient to invalidate Pennsylvania's statute. Instead it would bring us only to the next step of commerce clause inquiry, i.e. determining whether the statute serves a legitimate state purpose that cannot be equally well served by non-discriminatory means. *Maine v. Taylor*, 477 U.S. 131, 140 (1986).

actors other than itself, thereby forfeiting market participant status.

Appellants rely heavily on *W.C.M. Window Co. v. Bernardi*, 730 F.2d 486 (7th Cir. 1984). In *Window* the Seventh Circuit struck down an Illinois statute that required public works contractors, including those who contracted with local political subdivisions, to hire only Illinois laborers. *Id.* at 489. Defending its statute, Illinois contended that local subdivisions were part of the state, and that, in controlling local transactions, it was doing nothing more than directing with whom the state itself would do business, a privilege available under the market participant doctrine.

The Seventh Circuit, however, held that, for purposes of the market participant doctrine, local political subdivisions are not part of a state. The court acknowledged that for many purposes such local subdivisions are part of state government. However, the court concluded that there was an "analytical and qualitative" difference between a state requiring state agencies to hire state residents on public works projects and a state requiring local governmental units to do the same. The analytical difference lay in the lack of state involvement that results when neither state supervision nor state funds are included in a project. *Id.* at 496. The quantitative difference resulted from the breadth of local public works projects. Proceeding on the assumption that local municipalities do much more public contracting than state central governments, the *Window* court thought that extending market participant protection to such regulatory schemes "could do great damage to the principles of free trade on which the negative commerce clause is based." *Id.* The court thus held that such a scheme does not qualify for protection under the market participant

doctrine and hence violates the commerce clause. *Id.* at 495, 496.[13]

Respectfully, we disagree. We find no compelling analytical difference between a local government unit and central state agencies. Both exist only through affirmative acts of the state. A municipality derives its authority from the state. *United Building and Trades Council of Camden County v. Mayor and Council of the City of Camden*, 465 U.S. 208, 215 (1984).[14] Under Pennsylvania law it is clear that the local bodies covered by the statute exist only by grace of state authority and with such powers as the state affirmatively provides.[15] We see no reason why, attendant on making such affirmative grants of power, the Commonwealth may not also restrict the contracting authority of such local bodies. Imposing such restrictions on central state agencies certainly would be permitted and we do

13. The Seventh Circuit also held that the statute was unconstitutional under the privileges and immunities clause of Article IV.

14. See *City of Trenton v. State of New Jersey*, 262 U.S. 182, 187 (1923) (a state "may withhold, grant or withdraw powers and privileges as it sees fit. However great or small [the municipality's] sphere of action, it remains the creature of the state exercising and holding powers and privileges subject to the sovereign will.").

15. See, e.g., *Department of Public Welfare v. Adams County*, 373 A.2d 143, 145 n. 4 (Pa. Commw. Ct. 1977) (Commonwealth "exercise[s] absolute control over counties") *rev'd on other grounds*, 392 A.2d 692 (1978); *Plum Twp. Annexation Case*, 116 A.2d 260 (Pa. Super Ct. 1955) ("all municipalities are agents of the state"); *Darby v. Sharon Hill*, 4 A. 722 (1886) (borough is "merely an agency instituted by the sovereign") and *Simon Appeal*, 184 A.2d 695 (1962) (municipal authority is "an independent agency of the Commonwealth").

not believe restrictions on local bodies stand in any different light.

It may be true that local municipalities and authorities are responsible for the great bulk of sub-national public procurement. However, we find no suggestion in the Supreme Court's previous forays into this area that the quantum of market purchases should affect a public entity's qualification for market participant status. Indeed, to accept the argument would suggest the curious result that identical legislation adopted by small and large states might suffer different constitutional fates.

We believe the Court's decision in *White* further supports our conclusion. There, the Supreme Court upheld an order by the Boston mayor requiring that all city and federally funded construction projects be performed by a work force of at least half Boston residents. The Court rejected a claim that the order violated the commerce clause because it effectively regulated employment contracts between private contractors and their employees, contracts to which the city was not a party. The Court reasoned that "the Commerce Clause does not require the city to stop at the boundary of formal privity of contract . . . [e]veryone affected by the order is, in a substantial if informal sense, "working for the city." *White*, 460 U.S. at 211 n. 7. If employees of a private contractor can be thought to be in relationship with the city, we think it equally clear that suppliers of a local public entity can be thought to be "supplying for the state." As the ultimately controlling public purchaser, the Commonwealth enjoys the same right to specify to its suppliers the source of steel to be used in any supplies provided as is enjoyed by similarly situated private purchasers.

Nor do we find that the commerce clause's underlying purposes require a broad prohibition against state regulation of local municipal purchases. As noted in *Reeves*, "the Commerce Clause responds principally to state taxes and regulatory measures impeding free *private* trade in the national marketplace . . . [t]here is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." 447 U.S. at 436-37 (emphasis added). Nor, we take it, is there any indication of an intent to limit the market operations of local public entities. Given that local entities can presumably decide for themselves to contract only for American steel, cf. *White*, 460 U.S. at 215, we think it clear that the Commonwealth, from which local municipalities derive their power, can impose similar limits.

We also are not persuaded that the fact that the products being excluded are of foreign origin countenances a different result. It is true that the Supreme Court has suggested that statutes affecting foreign commerce are subject to a more searching review. *Reeves*, 447 U.S. at 437 n. 9.[16] In striking Alaska's requirement that timber taken from state lands be processed in-state, the *Wunnicke* plurality stated

> [w]e are buttressed in our conclusion that the restriction is invalid by the fact that foreign commerce is burdened by the restriction. It is a well-accepted rule that State restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny. It is

16. The Court stated that "Commerce Clause scrutiny may well be more rigorous when a restraint on foreign commerce is alleged" (citing *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979)).

> crucial to the efficient execution of the Nation's foreign policy that "the Federal Government . . . speak with one voice when regulating commercial relations with foreign governments."

Wunnicke, 467 U.S. at 100.

We hold, however, that the Pennsylvania statute survives even the most searching review. In *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), the Court identified two concerns that underlie the application of a more probing analysis to state statutes that affect foreign commerce. First, there is the danger of multiple taxation. *Id.* at 446. That concern is not implicated by the Steel Act. Second, state enactments may "impair federal uniformity in an area where federal uniformity is essential." *Id.* at 448. We do not believe state procurement policy to be such an area. State procurement practices present no problems of reconciling conflicting policy among multiple national sovereigns. Compare *id.* at 450. Furthermore, the record in this case shows that Congress is aware of state activity[17] to restrict procurement of foreign goods, see supra, Part I, and yet has not imposed a policy of national uniformity. Thus, state procurement policy fits comfortably within the Supreme Court's observation that nothing in "the Foreign Commerce Clause *insists* that the Federal Government speak with any particular voice." *Wardair Canada v.*

17. Pennsylvania is one of at least eleven states that have some form of buy-American legislation. See Ala. Code § 39-3-4 *et seq.* (1987 Supp.), 48 Ill. Rev. Stat. ch. 48, para. 1801 *et seq.* (1986), Ind. Code Ann. § 5-16-8-2 *et seq.* (West 1984), Mass. Gen. Laws Ann. ch. 7 § 22 (1969), Md. State Fin. & Proc. Code Ann. § 12-401 *et seq.* (1985), N.Y. State Fin. Law § 146 (1988), W. Va. Code § 5-19-1 *et seq.* (1987), R.I. Gen. Laws § 37-2.1 *et seq.* (1984), Ohio Rev. Code Ann. § 153.011 (1987), N.J. Stat. Ann. § 40A:11-18 (West 1973).

Florida Dept. of Revenue, 477 U.S. 1, 13 (1985).[18] To the degree that Pennsylvania's statute implicates foreign policy in areas other than commercial trade, appellants' objections are best focused on the federal government's power to control foreign affairs rather than the commerce clause. It is to that aspect of appellants' claims that we now turn.

III. *The Foreign Affairs Power Challenge*

The formulation and administration of foreign affairs is vested exclusively in the federal government. Consequently, any state law that involves the state in the actual conduct of foreign affairs is unconstitutional. *United State v. Pink*, 315 U.S. 203, 233 (1942). See also, L. Tribe, *American Constitutional Law*, § 4-6, at 230 (2d ed. 1988) ("state action, whether or not consistent with current federal foreign policy, that distorts the allocation of responsibility to the national government for the conduct of American diplomacy is void"). In contrast, any action that has only "'some incidental or indirect effect in foreign countries'" does not intrude on the foreign relations power. *Zschernig v. Miller*, 389 U.S. 429, 432 (1968) (citation omitted).

On only one occasion has the Supreme Court struck down a state statute as violative of the foreign relations power. In *Zschernig* the Court held unconstitutional an Oregon statute which provided that a nonresident alien could not inherit

18. In *Wardair* the Court upheld a Florida aviation fuel tax as applied to a Canadian air carrier engaged in international traffic. The tax was upheld despite the United States being a party to more than seventy bilateral and multilateral aviation agreements, many of which contain provisions governing fuel taxes. 477 U.S. 9-13.

from an Oregon decedent unless three conditions were met: (1) the alien's government must accord Americans the right to inherit on equal terms; (2) the alien's government must give Americans the right to receive payment in the United States of funds from foreign estates; and (3) foreign heirs inheriting from Oregon estates must be able to do so without confiscation by their government.

In considering the application of the Oregon statute, the Court noted that Oregon courts, and other state courts enforcing similar statutes, had routinely launched inquiries into the type of government that obtained in the inheritor's country, inquiries that radiated cold war attitudes regarding the democratic or Marxist characteristic of various regimes. *Id.* at 434-35. The Court concluded that the "real desiderata" of Oregon court decisions were the foreign policy attitudes of local probate courts, attitudes that moved with the wax and wane of the cold war. *Id.* at 437. Applied in this way, the Court thought that the Oregon statute "held great potential for disruption or embarrassment." *Id.* at 435. The Court concluded that the statute had a direct impact upon foreign relations and had potential to affect adversely the power of the central government to deal with such problems. As such it was invalid. *Id.* at 441.

The Pennsylvania statute exhibits none of the dangers attendant on the statute reviewed in *Zschernig*, for Pennsylvania's statute provides no opportunity for state administrative officials or judges to comment on, let alone key their decisions to, the nature of foreign regimes. On its face the statute applies to steel from any foreign source, without respect to whether the source country might be considered friend or foe. Nor is there any indication from the record that the statute has

been selectively applied according to the foreign policy attitudes of Commonwealth courts or the Commonwealth's Attorney General.[19] And while it is possible that sub-national government procurement restrictions may become a topic of intense international scrutiny, and a target in international trade negotiations, that possibility alone cannot justify this court's invalidation of the Commonwealth's statute. This is especially true when Congress has recently directed its attention to such restrictions and has taken no steps to preempt them through federal legislation. Indeed, in light of Congress' evident concern with achieving freer trade on a reciprocal basis, to strike Pennsylvania's statute would amount to a judicial redirection of established foreign trade policy —- a quite inappropriate exercise of the juidcial power.

IV. *The Vagueness Challenge*

Appellants and appellees agree that controlling vagueness doctrine is set out in *Grayned v. City of Rockford*, 408 U.S. 104 (1972). In *Grayned* the Court explained

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary

19. Appellants do suggest that Pennsylvania's enforcement inquiries were made only at the request of a Trojan competitor. The suggestion is *dehors* the record, as the facts stipulated by the parties make no mention of how Trojan's potential violation originally came to the Attorney General's attention. Even if true, appellants' allegation does not establish —- indeed, it does not even suggest —- that the statute is being selectively enforced against suppliers from only a particular nation or group of nations, according to foreign policy attitudes held by Pennsylvania officials.

> intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* subjective basis, with the attendant dangers of arbitrary and discriminatory applications.

Id. at 108-09. Thus, a statute should be struck as vague if (1) it fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, or (2) it fails to provide explicit standards to the enforcing officer, in this case Pennsylvania's Attorney General.

The Court also has declared that

> economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.

Village of Hoffman Estate v. Flipside, Hoffman Estate, Inc., 455 U.S. 489, 498-99 (1982).[20] *Hoffman Estates* added that "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Id.* at 495.

Appellants first contend that the Steel Act should be subject to a relatively strict vagueness review, as the sanctions it imposes — characterized by defendant as civil penalties but "commercially devastating," Appellants' Brief, at 42 — are severe. We disagree. It is not clear to us that barring a supplier from public contracting within the Commonwealth for five years is severe. Such a supplier remains free to participate in the private Pennsylvania market and to supply purchasers in other states. In any case, for purposes of testing the penal severity of a given statute, *Hoffman Estates* focused on the distinction between criminal and civil sanctions, i.e. between incarceration and financial penalties. We know of no case in which a civil statute has been subjected to strict vagueness review. Thus, Pennsylvania's statute will be measured against the more deferential standard usually attendant on commercial regulation.

Appellants contend that the statute is vague in several respects. First, appellants argue that the definition of "steel products," Pa. Stat. Ann. tit. 73, § 1886, is inadequate because (1) it fails to

20. We note that this suit effectively presents a facial challenge to the statute, i.e. there is nothing in the record to indicate how the statute has been interpreted by the Pennsylvania courts and the Pennsylvania Attorney General, nor is there any indication of what, if any, administrative mechanisms may be available to clarify the statute's coverage.

identify how much steel must be fabricated into otherwise non-steel products to convert that product into a "steel product," Appellants' Brief, at 43-45, and (2) it fails to provide standards for determining when steel is "United States steel," Appellants' Brief, at 45-47.

To demonstrate the first of these points, appellants set out a parade of horribles, e.g. is a wooden chair with nails a steel product? But rhetorical questions of this sort, though intriguing, are not to the point. As noted in *Hoffman Estates*, appellants' burden is to show that the statute is vague with respect to *their* activity. The statutory definition of steel products expressly incorporates the United States Commerce Department Standard Industrial Classification 35. Classification 35 specifically includes "sewage purification equipment." The UV-2000 undoubtedly falls within such a class, giving appellants ample warning that their product is within the Steel Act's ambit.[21]

Appellants also claim that "steel products" is vague because it provides no standards for determining when "articles, materials, and supplies" have been "mined, produced, or

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21. Appellants contend that such a listing alone is insufficient to ameliorate the statute's vagueness, pointing out that the same classifications incorporated by the Pennsylvania statute also list "wooden chairs." They similarly object that the statute is unconstitutionally vague because it leaves unclear whether suppliers must certify that United States steel is used in "nuts and bolts holding the system together," Appellants' Brief, at 47. Again, however, by these objections appellants seek the benefits of a vagueness challenge as it might be raised by other parties. Whatever the case with respect to "wooden chairs" and "nuts and bolts," we have no doubt that a manufacturer of "sewage purification equipment" whose product contains several steel components has had sufficient warning that his product is covered by the statute.

manufactured" or "melted and manufactured" in the United States. Appellants note specifically that much steel is reprocessed, resulting in the final product becoming the combination of foreign and domestic steel. Under such circumstances, appellants claim that "United States steel" is inherently vague.

However, the difficulty facing appellants is not that the definition of United States steel is vague but that as a matter of commercial practice it may not always be easy to find steel that satisfies the requirement. Inability to satisfy a clear but demanding standard is different from inability in the first instance to determine what the standard is. We see no reason that Pennsylvania may not err on the side of caution in requiring clear affirmative evidence that steel being used is entirely of United States origin rather than, as appellants would have it, giving the benefit of the doubt to much of the steel that is in commercial use. If appellants wish to sell to public agencies in Pennsylvania, their remedy is to use virgin United States steel or to find some other means of tracing the steel's source.

V. *The Equal Protection Clause Challenge*

Finally, we find no merit in appellants' claim that the Steel Act violates the equal protection clause. Relying exclusively on *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 689 (1985), appellants contend that "the Steel Act unconstitutionally attempts to protect the United States steel industry by discriminating against foreign competition." Appellants' Brief, at 18. Such a purpose, argue appellants, is illegitimate under the equal protection clause. In *Metropolitan Life* the Supreme Court struck down an Alabama

statute that imposed a higher tax rate on nonresident insurance companies than on resident companies. Later in the same term, however, *Metropolitan Life* was sharply limited to its facts in *Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159, 176 (1985). As the present case does not involve .the taxing power and "the Equal Protection Clause permits economic regulation that distinguishes between groups that *are* legitimately different – as local institutions so often are," *id.* at 180 (O'Connor, J. concurring), we find no basis for concluding that the Steel Act contravenes the equal protection clause.

VI. *Conclusion*

For the foregoing reasons, the judgment of the District Court will be affirmed.

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for the Third Circuit

APPENDIX B — OPINION AND ORDER OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 89-0364

TROJAN TECHNOLOGIES, INC., KAPPE ASSOCIATES, INC.,

Plaintiffs,

v.

COMMONWEALTH OF PENNSYLVANIA, LEROY ZIMMERMAN, Atty. Gen. of PA.,

Defendants.

MEMORANDUM

The parties to this declaratory judgment litigation have each filed a motion for summary judgment. At issue is the constitutionality of the Steel Products Procurement Act (73 P.S. § 1881 et seq.), enacted by the Commonwealth of Pennsylvania in 1978 (the Act). The Act requires public agencies, when undertaking the construction of public works, to include a provision in their contracts that the steel used in all projects be produced in the United States.

Plaintiff Trojan Technologies, Inc. is a Canadian corporation engaged in the manufacturing of equipment used in waste water/sewage treatment facilities. Kappe Associates, Inc. is Trojan's representative in Pennsylvania. In March 1988, the

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Attorney General of Pennsylvania received a request to investigate whether certain equipment manufactured by Trojan and suitable for use in public work projects, was in compliance with the Act. On June 29, 1988, the Attorney General determined that Trojan's equipment was covered by the Act.[1] He requested that Trojan submit documentation showing that the steel in its product was made in the United States. The Attorney General also requested information from seven municipal authorities concerning their possible purchase of Trojan's UV-2000 systems, which could be in violation of the Act. The Attorney General intends to enforce the Act against Trojan, and although no proceedings have been instituted it is not disputed that the Act would preclude the use of the Trojan product in public work projects in Pennsylvania. This suit was filed on August 8, 1988 in the Eastern District Court of Pennsylvania and transferred to this District on February 2, 1989.

Plaintiffs' position that the Act is unconstitutional or invalid is based on the following:

> 1) The Act violates the Commerce Clause of the United States Constitution.
>
> 2) The Act is an intrusion into foreign affairs of the United States, an area reserved to the federal government.
>
> 3) The Act is preempted by federal statutes and foreign trade agreements between the United States and Canada.

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1. The equipment is an ultraviolet light disinfection system, known as UV-2000.

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4) The Act is void for vagueness.

The Commerce Clause Challenge

Plaintiffs contend that the effect of the Act is to regulate the importing or sale in Pennsylvania of steel made outside the United States. Plaintiffs submit that the regulation of commerce with foreign nations is a subject that is within the exclusive control of the federal government under the commerce clause of the United States Constitution. Citation of authority is not required to affirm this basic principle, and if the Act does, in fact, regulate commerce with foreign countries it is invalid. A state law may violate the commerce clause if its purpose or effect is to discriminate against foreign competition. Examples of such illegal laws are *Bacchus Imports Ltd. v. Dias,* 468 U.S. 263, 82 L.Ed.2d 200, 104 S.Ct. 3049 (1984), where the state of Hawaii imposed a tax on the sale of liquor at wholesale but exempted certain locally produced beverages, and *Hunt v. Washington Apple Adv. Comm.*, 432 U.S. 333, 53 L.Ed.2d 383, 97 S.Ct. 2434 (1977), where a North Carolina statute attempted to limit the "grading" information that could be used on closed containers of apples shipped to North Carolina. In both instances the state laws discriminated against foreign products in favor of locally produced goods.

In opposing plaintiffs' motion for summary judgment, and in support of its cross motion, the defendants dispute that the Steel Products Procurement Act regulates commerce or otherwise intrudes in areas reserved to the federal government. The defendants contend that public agencies of the Commonwealth are "market participants", and that the Act does no more than limit the products that may be purchased or used in constructing public projects. Rather than "regulating" or attempting to regulate the sale in Pennsylvania of foreign made steel, the state contends

it is legitimately supporting an important local and national industry by restricting steel purchases of public agencies to domestically produced steel.

The rationale for the "market participant" exception is illustrated in *Hughes v. Alexandria Scrap Corporation*, 426 U.S. 794, 49 L.Ed.2d 220, 96 S.Ct. 2488 (1976). Maryland enacted a complex statute aimed at reducing the volume of inoperable or junk vehicles in Maryland by offering an incentive to scrap processors. The law provided, among other things, for the payment of a "bounty" to scrap processors who destroyed and processed junk vehicles formerly titled in Maryland. Processors located in Maryland were provided an easy means of proving the origin of such vehicles, while non-Maryland scrap processors were held to a more demanding measure of proof in order to claim the bounty. Plaintiff, a Virginia scrap processor, challenged the statute as violative of the commerce clause. The Maryland District Court agreed, finding that the law imposed "substantial burdens upon the free flow of interstate commerce" and discouraged wreckers from taking vehicles out of Maryland for processing. The Supreme Court, however, reversed and held that the commerce clause does not require independent justification when a state enters the market as a purchaser:

> Nothing in the purposes animating the Commerce Clause forbids a State, in the absence of congressional action, from participation in the market and exercising the right to favor its own citizens over others.

The Supreme Court acknowledged that the effect of the statute may tend to keep junk vehicles from flowing to out of state processors, but noted that "no trade barrier of the type

forbidden by the Commerce Clause . . . impedes their movement out of state." (49 L.Ed.2d at 231).

We find defendants' argument persuasive and conclude that public agencies applying the Act are no more than market participants in complying with the Act and specifying the use of domestically produced steel in public work projects. The legislation at issue here does not attempt to control or limit the free flow, or the sale, of foreign steel products in Pennsylvania. The legislature simply announced that public agencies in Pennsylvania must support and foster the well being of an important state and national industry by restricting its purchases of steel or steel products to those made in this country. Although this action may reduce the volume of foreign steel actually sold in Pennsylvania, it does not create a barrier to its free flow into Pennsylvania. Just as with a private entity, the state may exercise a choice as to what it will purchase, but it does not thereby "regulate" commerce in the constitutional sense.

The Intrusion of the Act into Foreign Affairs

Plaintiffs contend that the Act intrudes into foreign policy or international affairs, which is an area within the exclusive control of the federal government. Although the Constitution makes no express grant, the exclusive control of foreign affairs by the federal government is well established and beyond debate. Plaintiffs refer to several cases where state laws have been held to interfere in foreign matters. In *Hines v. Davidowitz,* 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581, (1941), the Supreme Court struck down a Pennsylvania law that required aliens to register annually with the state Department of Labor and Industry. The Court ruled that a similar federal law was intended by Congress as a comprehensive and uniform scheme for the regulation of all aliens,

and rendered the state law unenforceable. In *Zschering v. Miller*, 389 U.S. 429, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968), the Supreme Court voided an Oregon law that placed conditions on the rights of nonresident aliens to inherit property owned by Oregon decedents, holding that the law impaired the effective exercise of the nation's foreign policy. These laws each had a direct relationship to overriding national concerns, but we find no support in such holdings for concluding that the Act in question intrudes in foreign affairs. The Steel Products Procurement Act does not bring Pennsylvania into contact with a foreign government or with foreign affairs, and the only impact of the Act on other countries is incidental - i.e., a possible decrease in the total sales of foreign steel in Pennsylvania because public agencies will not buy it. This result, however, is traceable to participation in the market place and not to any effort to control or regulate commerce with foreign countries.

Preemption by Federal Laws

Plaintiffs also argue that legislation such as the Act is preempted by various federal agreements or legislation, including the United States - Canada Free Trade Agreement. However, we doubt that Congress intended the trade agreement to preempt states from being "market participants," and there is no clear intent of congress to forbid states from taking action to limit to the source of their purchase of commodities. In *Kentucky West Virginia Gas v. P.U.C.*, 837 F.2d 600 (3d Cir. 1988) the court outlined the three tests for determining if preemption has occurred:

> 1) when enacting federal laws, Congress explicitly announces its intent to preempt state law;
>
> 2) in the absence of express preemptive

language, Congress indicates an intent to occupy an entire field of regulation, and leaves no room for states to supplement the federal law;

3) when compliance with state and federal law is impossible, or when state law is an obstacle to realizing Congressional objections.

We agree with defendants that preemption is not demonstrated. In none of the laws cited by plaintiffs has Congress prohibited states from being market participants, and the trade statutes or agreements in question are limited to the importation/purchase of foreign products by the federal government.[2] The Steel Products Procurement Act does not close Pennsylvania to the free flow of foreign steel products, and the court is not persuaded that the incidental result of reducing the quantities of foreign steel sold in Pennsylvania comes into conflict with trade policies, etc. of the United States. If a "buy-America" goal of a state intrudes into foreign affairs, or conflicts with federal trade efforts, Congress could easily occupy the field with express legislation to prohibit the practice by state governments.

Vagueness of the Act

The Act requires that only "steel products," as defined in Section 1886, be used in all public agency projects. Plaintiffs contend the Act should be voided because of its imprecise definition of "steel products." Generally speaking "steel products" is defined as those produced from steel made in the United States. Plaintiffs argue that under the terms of the Act it cannot be

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2. In addition to the United States-Canada Free Trade Agreement, plaintiffs also refer to the Agreement on Government Procurement, etc. of 1979; the Steel Import Stabilization Act of 1974; the Trade Act of 1974; and the Trade Agreement Act of 1979.

ascertained where the line is drawn in deciding whether a public agency is dealing with an item covered by the broad definition in the Act. Plaintiffs pose their dilemma by asking whether a written report on a public project, held together by a steel staple, is a "steel product"; or are chairs supplied to a public agency that are held together by a few steel nails included within the definition; or is a calculator, held together with steel screws, a "steel product"? The steel in the product involved in this case constitutes about 15% of its total cost, but what if it were only 5% or 2%? Where is the threshold and how much steel is enough? Where both foreign and domestic steel are used in a product it is considered a "steel product", and acceptable, if 75% of the cost of the "articles, materials and supplies" have been "mined, produced or manufactured" in the United States, but how does one determine the meaning of the quoted language?

We agree with plaintiffs that many situations can be posed where the applicability of the Act would be difficult, if not impossible, to ascertain. But the legal test for vagueness is not based upon one's ability to conjure up a factual setting where the application of a particular law is uncertain. The Supreme Court has announced that to void a vagueness challenge the law must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Graymead v. City of Rockford,* 408 U.S. 104, 33 L.Ed.2d 222, 92 S.Ct. 2294 (1922). Moreover, when considering whether a law is void for vagueness the nature of the enactment must be considered. In *Village of Hoffman Estates, Inc. v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 71 L.Ed.2d 362, 371-372, 102 S.Ct. 1186 (1982) the Court said:

> Thus, economic regulations is subject to a less strict vagueness test because its subject matter is often

> more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.

In concluding that the ordinance at issue in *Hoffman Estates* did not implicate consitutionally protected conduct, the Supreme Court noted that, "a plaintiff who engaged in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others" (p. 369). Thus, the fact that the definition of "steel products" may be vague under other circumstances is unavailing to plaintiffs here. The parties have stipulated that the steel components of the UV-2000 system, constitute "less than 15%" of the cost of the system, but we find this to be a significant part of the product. Additionally, "sewage purification equipment" is a classification listed in category #35 of the United States Department of Commerce's classification of machinery, which is incorporated by reference in the definition of "steel products." If the steel in the UV-2000 system was not made in the United States it is not a "steel product" defined in the Act, and thus public agencies would be prohibited from including it in public works projects in Pennsylvania.

Appendix B

An appropriate order will be entered.

s/William W. Caldwell
William W. Caldwell
United States District Judge

Date: January 5, 1990

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO 89-0364

TROJAN TECHNOLOGIES, INC., KAPPE ASSOCIATES, INC.,

Plaintiffs,

v.

COMMONWEALTH OF PENNSYLVANIA, LEROY ZIMMERMAN, Atty. Gen. of PA,

Defendants.

ORDER

AND NOW, this 5th day of January, 1990, plaintiffs' request for declaratory and injunctive relief is denied. The Clerk of Court is directed to close this file.

s/William W. Caldwell
William W. Caldwell
United States District Judge

Filed: January 5, 1990

APPENDIX C — THE STEEL PRODUCTS PROCUREMENT ACT

CHAPTER 25. STEEL PRODUCTS PROCUREMENT ACT

Section
1881. Short title.
1882. Police power.
1883. Public policy.
1884. Required contract provisions.
1885. Payments under contracts; action to recover unauthorized payments; prohibitions for violations; procedure.
1886. Definitions.
1887. Purpose of act; liberal construction.

Provisions constituting Chapter 25, the Steel Products Procurement Act, consisting of §§ 1881 to 1887, were enacted by Act 1978, March 3, P.L. 6, No. 3, §§ 1 to 9, generally effective in 60 days.

§ 1881. Short title

This act shall be known and may be cited as the "Steel Products Procurement Act."

1978, March 3, P.L. 6, No. 3, § 1, effective in 60 days.

Historical and Statutory Notes

Section 8 of Act 1978, March 3, P.L. 6, No. 3 is general repealer.

Section 9 of Act 1978, March 3, P.L. 6, No. 3 provides that the act shall take effect in 60 days but shall not apply to any contract awarded pursuant to an invitation for bids issued on or before the effective date of said act.

Title of Act:

An Act to promote the general welfare and stimulate the economy of the Commonwealth by requiring that all public bodies, including the Commonwealth, its political subdivisions, and all authorities, include in all contracts for construction, reconstruction, alteration, repair, improvement or maintenance of improvements of a permanent or temporary nature, a provision that if any steel products are to be used in the performance of the contract only steel products produced in the United States shall be used, and imposing liability for violation of this act. 1978, March 3, P.L. 6, No. 3.

First class townships, application of act, see 53 P.S. § 56802.

Incorporated towns, application of act, see 53 P.S. § 53202.

Joint municipal activities, application of act, 53 P.S. § 487.1.

Municipal contracts generally, application of act, see 53 P.S. § 1003.

Municipal flood control contracts, application of act, see 53 P.S. § 2863.

Municipalities, joint purchase contracts, application of act, see 53 P.S. § 5432.

Parking authorities, application of act, see 53 P.S. § 351.

Pennsylvania transportation assistance authority, application of act, see 66 P.S. § 1912.

Port authorities, application of act, see 55 P.S. § 559.1.

Public auditorium authorities, application of act, see 53 P.S. § 23851.

Public School Building Authority, application of act, see 24 P.S. § 791.10.

Public television network commission, applica-

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Cross References

Borough contracts, application of act, see 53 P.S. § 46402.

Counties of third to eighth classes, application of act, see 16 P.S. § 1802.

Second class cities, application of act, see 53 P.S. § 23308.1.

Second class townships, application of act, see 53 P.S. § 65802.

State highway and bridge authority, application of act, see 36 P.S. § 3613.

tion of act, see 71 P.S. § 1188.4.

Purchases by public agencies, preference for domestic aluminum and steel products, see 71 P.S. § 773.101 et seq.

School contracts, application of law, see 24 P.S. § 7-751.

Third class cities, application of act, see 53 P.S. § 36901.

Water and power resources board, application of act, see 32 P.S. § 662.

§ 1882. Police power

This act shall be deemed to be an exercise of the police powers of the Commonwealth for the protection of the health, safety and general welfare of the people of the Commonwealth.

1978, March 3, P.L. 6, No. 3, § 2, effective in 60 days.

Historical and Statutory Notes

For effective date and application of act, see note under § 1881 of this title.

§ 1883. Public policy

It is hereby determined by the General Assembly of Pennsylvania and declared as a matter of legislative findings that:

(1) The Commonwealth of Pennsylvania is one of the leading states in the United States in the production of steel.

(2) The production of steel products constitutes a major industry of the Commonwealth and, as such, provides the jobs and family incomes of hundreds of thousands of the people of this Commonwealth and, in turn, millions of persons in the United States.

(3) The taxes paid to the Commonwealth and its political subdivisions by employers and employees engaged in the production and sale of steel products are one of the largest single sources of public revenues in this Commonwealth.

(4) It has, for many years, been the policy of the Commonwealth to aid and support the development and expansion of industry in this Commonwealth in order to foster the economic well-being of the Commonwealth and its people.

(5) The economy and general welfare of the Commonwealth and its people, as well as the economy, general welfare and national security of the United States, are inseparably related to the preservation and development of the steel industry in the Commonwealth and in the other states of the United States.

The Pennsylvania General Assembly therefore declares it to be the policy of the Commonwealth of Pennsylvania that all public officers and agencies should, at all times, aid and promote the development of the steel industry of the United States in order to stimulate and improve the economic well-being of the Commonwealth and its people.

1978, March 3, P.L. 6, No. 3, § 3, effective in 60 days.

Historical and Statutory Notes

For effective date and application of act, see note under § 1881 of this title.

§ 1884. Required contract provisions

(a) Every public agency shall require that every contract document for the construction, reconstruction, alteration, repair, improvement or maintenance of public works contain a provision that, if any steel products are to be used or supplied in the performance of the contract, only steel products as herein defined shall be used or supplied in the performance of the contract or any subcontracts thereunder.

(b) This section shall not apply in any case where the head of the public agency, in writing, determines that steel products as herein defined are not produced in the United States in sufficient quantities to meet the requirements of the contract.

1978, March 3, P.L. 6, No. 3, § 4, effective in 60 days.

Historical and Statutory Notes

For effective date and application of act, see note under § 1881 of this title.

§ 1885. Payments under contracts; action to recover unauthorized payments; prohibitions for violations; procedure

(a) No public agency shall authorize, provide for or make any payments to any person under any contract containing the provision required by section 4 [1] unless, when unidentified steel products are supplied under a contract, such person has provided documentation including, but not limited to, invoices, bills of lading, and mill certification that the steel was melted and manufactured in the United States, which establish that such person has fully complied with such provision. If a steel product is identifiable from its face, such person must submit certification which satisfies the public agency that such person has fully complied with the provision required by section 4. Any such payments made to any person by any public agency which should not have been made as a result of this section shall be recoverable directly from the contractor, subcontractor, manufacturer or supplier who did not comply with section 4 by either such public agency or the Attorney General of Pennsylvania.

(b) In addition to the withholding of payments, any person who willfully violates any of the provisions of this act shall be prohibited from submitting any bids to any public agency for any contract for a period of five years from the date of the determination that a violation has occurred. In the event the person who violates the provisions of section 4(a) is a subcontractor, manufacturer or supplier, such person shall be prohibited from performing any work or supplying any materials to a public agency for a period of five years from the date of the determination that a violation has occurred.

(c) Title 2 of the Pennsylvania Consolidated Statutes (relating to administrative law and procedure) applies to decisions by public agencies that a person has violated section 4(a).

1978, March 3, P.L. 6, No. 3, § 5, effective in 60 days. As affected 1980, Oct. 5, P.L. 693, No. 142, § 302, effective in 60 days. As amended 1984, July 9, P.L. 674, No. 144, § 1, effective in 60 days.

[1] Section 1884 of this title.

Repealed in Part

This section is repealed by Act 1980, Oct. 15, P.L. 950, No. 164, § 504 (71 P.S. § 732-504), insofar as it is inconsistent with provisions of said act.

Historical and Statutory Notes

For effective date and application of act, see note under § 1881 of this title.

1984 Amendment: Designated existing text as subsec. (a) and added subsecs. (b) and (c); in first sentence of subsec. (a), substituted "when unidentified steel products * * * in the United States, which establish" for "the public agency is satisfied", added second sentence of subsec. (a), and, in third sentence, inserted "manufacturer or supplier", and, made editorial changes.

Section 3 of Act 1984, July 9, P.L. 674, No. 144, provides as follows:

"This act shall not apply to any contract awarded pursuant to an invitation for bids issued on or before the effective date of this act."

§ 1886. Definitions

The following words and phrases when used in this act shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

"Person." Natural persons as well as corporations, partnerships, business units and associations.

"Public agency."

(1) the Commonwealth and its departments, boards, commissions and agencies;

(2) counties, cities, boroughs, townships, school districts, and any other governmental unit or district;

(3) the State Public School Building Authority, the State Highway and Bridge Authority, and any other authority now in existence or hereafter created or organized by the Commonwealth;

(4) all municipal or school or other authorities now in existence or hereafter created or organized by any county, city, borough, township or school district or combination thereof; and

(5) any and all other public bodies, authorities, officers, agencies or instrumentalities, whether exercising a governmental or proprietary function.

"Public works." Any structure, building, highway, waterway, street, bridge, transit system, airport or other betterment, work or improvement whether of a permanent or temporary nature and whether for governmental or proprietary use. The term includes, but is not limited to, any railway, street railway, subway, elevated and monorail passenger or passenger and rail rolling stock, self-propelled cars, gallery cars, locomotives, passenger buses, wires, poles and equipment for electrification of a transit system, rails, tracks, roadbeds, guideways, elevated structures, buildings, stations, terminals, docks, shelters and repairs to any of the foregoing.

"Steel products." Products rolled, formed, shaped, drawn, extruded, forged, cast, fabricated or otherwise similarly processed, or processed by a combination of two or more of such operations, from steel made in the United States by the open hearth, basic oxygen, electric furnace, Bessemer or other steel making process and shall include cast iron products and shall include machinery and equipment listed in United States Department of Commerce Standard Industrial Classification 25 (furniture and fixture), 35 (machinery, except electrical) and 37 (transportation equipment) and made of, fabricated from, or containing steel components. If a product contains both foreign and United States steel, such product shall be determined to be a United States steel product only if at least 75% of the cost of the articles, materials and supplies have been mined, produced or manufactured, as the case may be, in the United States. Transportation equipment shall be determined to be a United States steel product if it complies with section 165 of Public Law 97–424 (96 Stat. 2136).[1]

"United States." The United States of America and includes all territory, continental or insular, subject to the jurisdiction of the United States.

1978, March 3, P.L. 6, No. 3, § 6, effective in 60 days. As amended 1982, June 18, P.L. 556, No. 161, § 1, effective in 60 days; 1984, July 9, P.L. 674, No. 144, § 2, effective in 60 days.

[1] 23 U.S.C.A. § 101 note.

Historical and Statutory Notes

For effective date and application of act, see note under § 1881 of this title.

1982 Amendment: Act end of definition of "steel products" added "and shall include cast iron products".

Section 2 of Act 1982, June 18, P.L. 556, No. 161, provides as follows:

"This act shall take effect in 60 days but shall not apply to any contract awarded pursuant to an invitation for bids issued on or before the effective date of this act."

1984 Amendment: Added second sentence in definition of "public works" and, in definition of "steel products", added "and shall include machinery and equipment * * * with section 165 of Public Law 97–424 (96 Stat. 2136)".

Section 3 of Act 1984, July 9, P.L. 674, No. 144, provides as follows:

"This act shall not apply to any contract awarded pursuant to an invitation for bids issued on or before the effective date of this act."

§ 1887. Purpose of act; liberal construction

This act is intended as remedial legislation designed to promote the general welfare and stimulate the economy of the Commonwealth and its people and each and every provision hereof is intended to receive a liberal construction such as will best effectuate that purpose and no provision is intended to receive a strict or limited construction.

1978, March 3, P.L. 6, No. 3, § 7, effective in 60 days.

APPENDIX D — THE STIPULATION OF FACT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO 89-0364
(Judge Caldwell)

TROJAN TECHNOLOGIES, INC. and KAPPE ASSOCIATES, INC.,

Plaintiffs,

v.

COMMONWEALTH OF PENNSYLVANIA and LEROY S. ZIMMERMAN, ATTORNEY GENERAL, COMMONWEALTH PENNSYLVANIA

Defendants.

STIPULATION OF FACT

The following facts are stipulated to by and between counsel for plaintiffs and defendants:

1. Trojan Technologies, Inc. (hereinafter "Trojan") is a Canadian corporation with its offices and principal place of business in London, Ontario, Canada. Kappe Associates, Inc. ("Kappe") is a Maryland corporation, registered to do business in the Commonwealth of Pennsylvania, with its principal offices located in Rockville, Maryland.

2. Trojan manufactures ultraviolet light water disinfection systems. Kappe is Trojan's exclusive manufacturer representative

in the Commonwealth of Pennsylvania.

3. The Trojan System UV-2000 ("UV-2000") is a patented ultraviolet light disinfection system designed to kill harmful bacteria and other micro-organisms in water. A copy of the brochure describing the UV-2000 is attached as Exhibit "A".

4. The UV-2000 has applications in industry, potable water plants, and residential use.

5. The UV-2000 has been purchased by a number of municipalities and authorities in the Commonwealth of Pennsylvania and has been installed at discharge points in *inter alia,* waste water/sewage treatment facilities.

6. The UV-2000 is designed to disinfect water only. The UV-2000 is not designed to disinfect or purify sewage influent and cannot disinfect or purify sewage influent. It can be used to disinfect waste water or effluent which is to be discharged by sewage treatment facilities.

7. The basic UV-2000 contains a rack of four to eight ultraviolet lamps that are located in the "UV Module." The ultraviolet light from these lamps kills the bacteria and microorganisms as they pass through the UV modules.

8. The UV-2000 has a Power/Control (P/C) Module, which provides electricity to the UV Modules. The P/C Module contains electronic circuitry that monitors the current drawn by the ultraviolet lamps, water levels and operatuin of the UV-2000. The P/C Module is usually sited outdoors and therefore is housed in a stainless steel control box.

Appendix D

9. The UV-Modules are held in place by a stainless steel frame called the UV Module Rack.

10. Most of the steel in the UV-2000 is found in the UV Module Rack or the P/C Module control box.

11. The steel components of the UV-2000 constitute less than 15% of the cost of the entire UV-2000 system, the steel components are not sold as separate items but rather are component parts of the UV-2000.

12. Steel may be made by, *inter alia,* the use of the open hearth, basic oxygen, electric furnace, Bessemer or other steel making processes.

13. Once steel is made it may be rolled, formed, shaped, drawn, extruded, cast, melted, fabricated or otherwise processed.

14. Steel that is rolled, formed, shaped, drawn, extruded, cast, or fabricated may be rerolled, reformed, reshaped, reextruded, recast, remelted, and refabricated many times over.

15. Steel products that are produced in the United States often contain foreign made steel that has been reprocessed in the United States to form steel products.

16. Steel products that are produced in foreign countries often contain United States made steel that has been reprocessed in the foreign country to form steel products.

17. Once a steel product has outlived its usefulness, the steel product is often reprocessed to create another steel product.

Appendix D

18. Due to the reforming of steel and steel products, it may be on some occasions virtually impossible to determine the place in which the steel in the steel product was originally made.

19. Prior to the time that Trojan found itself the subject of inquiry regarding the UV-2000, the Steel Products Procurement Act, Act of March 3, 978, P.L. 6, No. 3, 73 Pa.C.S.A. Sections 1881-1887 had not been previously enforced by the Office of the Attorney General concerning ultraviolet disinfection systems.

20. The Office of the Attorney General has sought to enforce the Act against Trojan but has not yet made any final determination that Trojan has violated the Act and Trojan has not been subjected to any sanctions under the Act.

POWELL, TRACHTMAN,
LOGAN & LIDDLE

s/Paul A. Logan
Paul A. Logan
For Plaintiffs Trojan
Technologies, Inc. and Kappe
Associates, Inc.

OFFICE OF THE ATTORNEY
GENERAL

s/Thomas B. York
Thomas B. York
For Defendants Commonwealth of
Pennsylvania and Leroy S.
Zimmerman, Attorney General

Supreme Court, U.S.
FILED
FEB 25 1991
OFFICE OF THE CLERK

(2)

No. 90-1189

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM 1990

TROJAN TECHNOLOGIES, INC.,
et al.,

Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA,
and ERNEST D. PREATE, JR.
ATTORNEY GENERAL,

Respondents

On Petition for Certiorari to
the United States Court of
Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

ERNEST D. PREATE, JR.
Attorney General

BY: JOHN G. KNORR, III
Chief Deputy Attorney General
Chief, Litigation Section
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QUESTIONS PRESENTED

1. Whether a state that controls the purchasing decisions of its local agencies through a "buy-American" law is a market participant, rather than a market regulator, and as such is not subject to the restraints of the Commerce Clause?

2. Whether the market participant doctrine protects government purchasing decisions that affect foreign, as opposed to interstate, commerce?

3. Whether "buy-American" laws serve a legitimate state interest for purposes of the Equal Protection Clause?

LIST OF PARTIES

The parties listed in the caption to the petition for certiorari are accurate, except that respondent LeRoy S. Zimmerman, the Attorney General of Pennsylvania, has been succeeded in that office by Ernest D. Preate, Jr., who should be substituted for him. Sup. Ct. Rule 35.3.

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JURISDICTIONAL STATEMENT

The Court lacks jurisdiction over the respondent Commonwealth of Pennsylvania by virtue of the Eleventh Amendment to the Constitution. E.g., Alabama v. Pugh, 438 U.S. 781 (1978)(per curiam). While the Commonwealth did not assert its immunity in the District Court or the Court of Appeals, it may properly do so now. Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 466-67 (1945). The Eleventh Amendment does not affect the Court's jurisdiction over the other respondent, Attorney General Preate of Pennsylvania. Ex parte Young, 209 U.S. 123 (1908).

In all other respects, the respondents accept the petitioners' jurisdictional statement.

STATEMENT OF THE CASE

Pennsylvania's Steel Products Procurement Act, Pa. Stat. Ann. tit. 73, §§1881-1887 (Purdon 1990 Supp.), requires all public agencies, both state and local, to use American-made steel in their public works projects. The petitioners, a Canadian corporation and its American representative, Pet. App. 4a, claim that the statute is unconstitutional.

1. Petitioner Trojan Technologies, Inc. is a Canadian corporation that manufactures an ultraviolet water-disinfectant system known as the "UV-2000." Ibid. Several Pennsylvania agencies have purchased the UV-2000, and in July of 1988 the Pennsylvania Attorney General's Office sent letters to them, and to Trojan, requesting documentation that the UV-2000 complies with the Steel Products Act.

Ibid. Trojan has not supplied this information, and the Attorney General's Office has not yet determined whether the Steel Products Act has been violated. Pet. App. 4a-5a.

2. In the meantime, the petitioners filed this action, seeking declaratory and injunctive relief against the Commonwealth and the Attorney General. In the District Court, the petitioners claimed that the Steel Products Act a) violated the Commerce Clause, b) interfered with the federal government's power to conduct foreign relations, c) was preempted by various federal statutes and executive agreements and d) was void for vagueness. Pet. App. 31a-33a. On cross motions for summary judgment, the District Court rejected all of these claims and granted judgment to the respondents. Pet. App. 30a-40a. Petitioners appealed.

3. a. In the Court of Appeals, and at that court's invitation, the United States submitted a brief as amicus curiae, addressing the petitioners' Commerce Clause, preemption, and foreign affairs claims. Pet. App. 5a. On each of these issues, the United States argued that Pennsylvania's statute is constitutional. Among other matters, the United States advised the Court of Appeals that

> State and local government procurement policies in general, as well as restrictions on steel products in particular, are presently the subject of international negotiations....
>
> ....
>
> In the current climate of negotiations, the existence of state Buy-American laws in the United States does not interfere with our negotiators' consideration of whether to remove sub-national procurement barriers on an international basis. Such barriers are a common feature of the international scene. If U.S. negotiators reach an agreement to remove these barriers, such an

> agreement would, of course, pre-empt any conflicting state or local laws or regulations. (Citations omitted.) But until that occurs, the existence of such laws does not interfere in any way with the conduct of foreign trade policy.

Brief for the United States as Amicus Curiae, p. 18-20 (filed July 18, 1990).

b. The Court of Appeals affirmed the District Court's judgment. Turning first to the petitioners' preemption arguments, Pet. App. 5a-14a, the Court of Appeals held that the web of federal statutes and international agreements cited by the petitioners "do not constitute a comprehensive scheme so pervasive that it must exclude all state action." Pet. App. 14a. To the contrary, the federal government appeared to the Court of Appeals to have adopted "an explicit negotiating strategy" that permits state buy-American laws "pending sufficient trade concessions or

assurances of mutuality on the part of our international trading partners." Ibid.

On the Commerce Clause issue, the Court of Appeals agreed that the respondents were protected by the "market participant" doctrine: "a state or state subdivision that acts as a market participant rather than a market regulator 'is not subject to the restraints of the Commerce Clause.'" Pet. App. 15a, quoting White v. Massachusetts Council of Constr. Employees, Inc., 460 U.S. 204, 208 (1983). The Court of Appeals rejected the idea that Pennsylvania, in controlling the purchases of local agencies, was not acting as a market participant, and declined to follow a Seventh Circuit decision to that effect. Pet. App.

16a-20a, disagreeing with W.C.M. Window Co. v. Bernardi, 730 F.2d 486 (7th Cor. 1984).

The Court of Appeals recognized that statutes affecting foreign commerce may be subject to a more demanding scrutiny than those that affect only interstate commerce, and recognized as well that this Court has reserved decision on the validity of state buy-American laws. Pet. App. 20a-21a, citing Reeves, Inc. v. Stake, 447 U.S. 429, 437 n. 9. (1980). The court held, however, that Pennsylvania's statute "survives even the most searching review," Pet. App. 21a, and accordingly held that it does not violate the Commerce Clause.

Finally, the Court of Appeals considered and rejected the petitioners' claim that the statute violates the Equal Protection Clause. [1] Pet. App. 28a-29a. The petitioners had relied exclusively on Metropolitan Life Insurance Co. v. Ward, 470 U.S. 689 (1985)(striking down an Alabama statute discriminating against out-of-state insurance companies). The Court of Appeals, however, noted that Metropolitan Life had been "sharply limited to its facts," Pet. App. 29a, in Northeast Bancorp, Inc. v. Board of Governors, 472 U.S. 159 (1985)(upholding a Massachusetts statute discriminating against non-New England banks) and considered it inapplicable here.

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[1] The Court of Appeals also held that the Steel Products Act does not interfere with the federal government's foreign affairs power, Pet. App. 22a-24a, and that it is not void for vagueness. Pet. App. 24a-28a. Petitioners do not press these claims in this Court.

REASONS FOR DENYING THE WRIT

I. IT WOULD BE PREMATURE FOR THE COURT TO DECIDE WHETHER THE "MARKET PARTICIPANT" DOCTRINE PROTECTS STATES WHEN THEY CONTROL THE PURCHASING DECISIONS OF THEIR LOCAL AGENCIES.

The Court in Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976), held that when a governmental body engages in a commercial transaction--i.e., when it is a "market participant"--it is not subject to the restraints which the Commerce Clause imposes upon its activities when it acts as a market regulator. The narrow issue presented by this case is whether a state is a market participant when it acts, by statute, to control the purchasing decisions of state-created local agencies. This issue, however, has received virtually no prior attention in the lower courts and is, we submit, not yet ripe for this Court's review.

In the fifteen years since Hughes was decided, only one other court has reached this narrow issue. See W.C.M. Window Co. v. Bernardi, 730 F.2d 486 (7th Cir. 1984). It is true that the Third Circuit in this case declined to follow Bernardi, Pet. App. 17a-19a, but it is also true that the Seventh Circuit in Bernardi disposed of this issue perfunctorily, with little real analysis.[2] The Seventh Circuit did not, of course, have the benefit of the Third Circuit's reasoning in this case, which is to date the only detailed analysis of the issue.

---

2 Most of the Seventh Circuit's discussion in Bernardi was devoted to establishing that the market participant issue was not foreclosed by prior decisions of this Court, and was therefore open to the Seventh Circuit to decide. Id., 730 F.2d at 494-95. Its actual discussion of the issue itself comprises only a single conclusory paragraph. Id., 730 F.2d at 496.

It would therefore be premature for the Court to step in to settle a "conflict" which further events may show was illusory. In any event, an issue that arises only twice in fifteen years, and then in cases over six years apart, is hardly one that cries out for the Court's immmediate attention. To the extent that it continues to arise at all, this issue will benefit from further seasoning in the lower courts.

II. THE ISSUE OF WHETHER STATE BUY-AMERICAN LAWS VIOLATE THE FOREIGN COMMERCE CLAUSE HAS BEEN DORMANT FOR OVER A DECADE, AND DOES NOT MERIT REVIEW BY THE COURT.

In Reeves, Inc. v. Stake, 447 U.S. 429 (1980), the Court reserved the question of whether state buy-American laws violate the Foreign Commerce Clause. Id., 447 U.S. at 437 n. 9. Since Reeves, however, the issue has

apparently lain dormant. The petitioners not only point to no decision that conflicts with the Third Circuit's holding in this case, they point to no decision, in the eleven years since Reeves, that addresses the issue at all, and the respondents know of none. The issue thus scarcely seems to be a pressing one.

The petitioners, however, rely on the supposed need to maintain what they call a "uniform federal policy with respect to the importation of foreign steel," Pet. 17, and to prevent local interference in our international trade relations. Pet. 18. This asserted need for uniformity and federal supremacy--which is really just a restatment of the petitioners' discredited preemption arguments, see Pet. App. 5a-14a--is belied by the

contrary position taken by the United States in its amicus curiae brief to the Court of Appeals. Supra at 4-5; Pet. App. 5a & n. The policies and interests of the federal government in the area of international trade are, we submit, more likely to be correctly identified by the United States itself than by a foreign manufacturer.

As the Court of Appeals recognized, the United States is concerned "with achieving [the] reciplocal...reduction" of trade barriers such as the Steel Products Act. Pet. App. 10a (emphasis in original). It is odd indeed for petitioners to take the position that the national interest requires their unilateral reduction.

III. THE PETITIONERS' EQUAL PROTECTION CLAIM WAS PROPERLY RESOLVED BY THE ROUTINE APPLICATION OF ESTABLISHED PRINCIPLES.

The petitioners present for the Court's review what is, in reality, a common or garden equal protection challenge to state economic legislation. The correct analysis is well-settled: is the legislation, or is it not, rationally related to furthering a legitimate state interest? The petitioners cannot pretend that the Court of Appeals did not apply the correct legal principles to their claim, see Pet. App. 28a-29a; they simply disagree with the outcome. Disagreements over the application of well-settled legal principles to specific cases, however, do not merit the Court's discretionary review.

CONCLUSION

For these reasons, the respondents ask the Court to deny the writ of certiorari.

Respectfully submitted,

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No. 90-1189

In the Supreme Court of the United States

OCTOBER TERM, 1990

TROJAN TECHNOLOGIES, INC., ET AL., PETITIONERS

v.

COMMONWEALTH OF PENNSYLVANIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Pennsylvania Steel Products Procurement Act, Pa. Stat. Ann. tit. 73, §§ 1881 *et seq.* (Purdon Supp. 1990), which requires state and local governmental entities within the Commonwealth of Pennsylvania to contract only with those persons who will use or supply domestically produced steel products for public works projects, violates the Commerce Clause or the Equal Protection Clause.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This submission responds to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. The Pennsylvania Steel Products Procurement Act, Pa. Stat. Ann. tit. 73, §§ 1881 *et seq.* (Purdon Supp. 1990), requires every "public agency" within the Commonwealth of Pennsylvania,[1] which enters

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[1] The Act broadly defines "public agency" to include the following:

(1) the Commonwealth and its departments, boards, commissions and agencies;

(2) counties, cities, boroughs, townships, school districts, and any other governmental unit or district;

(3) the State Pubiic School Building Authority, the State Highway and Bridge Authority, and any other

into a contract "for the construction, reconstruction, alteration, repair, improvement or maintenance of public works," to include a contract provision that "only steel products as herein defined shall be used or supplied in the performance of the contract or any subcontracts thereunder." Pa. Stat. Ann. tit. 73, § 1884(a) (Purdon Supp. 1990). As defined by the Act, the comprehensive term "steel products" includes

> [p]roducts rolled, formed, shaped, drawn, extruded, forged, cast, fabricated or otherwise similarly processed, or processed by a combination of two or more of such operations, *from steel made in the United States* by the open hearth, basic oxygen, electric furnace, Bessemer or other steel making process * * *.

Pa. Stat. Ann. tit. 73, § 1886 (Purdon Supp. 1990) (emphasis added).[2]

2. Petitioner Trojan Technologies, Inc., a Canadian corporation, manufactures equipment used in

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> authority now in existence or hereafter created or organized by the Commonwealth;
>
> (4) all municipal or school or other authorities now in existence or hereafter created or organized by any county, city, borough, township or school district or combination thereof; and
>
> (5) any and all other public bodies, authorities, officers, agencies or instrumentalities, whether exercising a governmental or proprietary function.

Pa. Stat. Ann. tit. 73, § 1886 (Purdon Supp. 1990).

[2] The Act further provides that

> [i]f a product contains both foreign and United States steel, such product shall be determined to be a United States steel product only if at least 75% of the cost of the articles, materials and supplies have been mined, produced or manufactured, as the case may be, in the United States * * *.

Pa. Stat. Ann. tit. 73, § 1886 (Purdon Supp. 1990).

waste and sewage treatment plants. Petitioner Kappe Associates, Inc., a Maryland corporation, is Trojan's sales representative in the United States. Among other products, Trojan manufactures the "UV-2000" —an ultraviolet light water disinfection system. The UV-2000 has two steel components, the module rack and the module control box. Pet. App. 4a. Sometime before 1988, "[s]everal Pennsylvania municipalities and authorities * * * purchased the UV-2000 and installed it at waste-water and sewage-treatment facilities." *Ibid.* In July 1988, the Attorney General of Pennsylvania notified Trojan that the firm's UV-2000 "is covered by the Steel Procurement Act," C.A. App. 14a, and therefore "request[ed] documentation confirming that its ultraviolet disinfection system complies with the Act," Pet. App. 4a; see C.A. App. 37a.[3]

In response, Trojan and Kappe filed this federal court action in August 1988 against respondents, the Commonwealth of Pennsylvania and the Attorney General of Pennsylvania. Petitioners contended that the Steel Products Procurement Act was unconstitutional on several grounds, and therefore sought an injunction against its enforcement. In particular, petitioners claimed that the Act violated the Commerce Clause, impermissibly trenched on the federal government's exclusive authority over foreign affairs, conflicted with federal law, and was otherwise void for vagueness. Pet. App. 5a, 31a-32a; see C.A. App. 9a-10a (Compl. ¶ 10).

3. On cross-motions for summary judgment, the district court in January 1990 denied petitioners'

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[3] As the court of appeals pointed out, "there has been no final determination that the Act has been violated [by petitioners' sales of the UV-2000 to Pennsylvania municipalities]." Pet. App. 5a.

claims and upheld the constitutionality of the Pennsylvania Steel Products Procurement Act. Pet. App. 30a-40a.[4] The court rejected petitioners' Commerce Clause challenge, holding that the Commonwealth's promulgation and enforcement of the Act fell within the "market participant" doctrine. *Id.* at 33a-34a (citing *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976)). The court concluded that

> public agencies applying the Act are no more than market participants in complying with the Act and specifying the use of domestically produced steel in public work projects.

Pet. App. 34a. The court noted that the state legislature, in the Act, did "not attempt to control or limit the free flow, or the sale, of foreign steel products in Pennsylvania." *Ibid.* Rather, the court determined, "[j]ust as with a private entity, the state may exercise a choice as to what it will purchase, but it does not thereby 'regulate' commerce in the constitutional sense." *Ibid.*

Turning to petitioners' claim regarding the Act's alleged interference with the federal government's exclusive authority over foreign affairs, the court concluded that the Act

> does not bring Pennsylvania into contact with a foreign government or with foreign affairs, and the only impact of the Act on other countries is incidental—i.e., a possible decrease in the total sales of foreign steel in Pennsylvania because public agencies will not buy it.

Pet. App. 35a. Since that "result * * * is traceable to participation in the marketplace and not to any

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[4] Petitioners' action, which had been filed in the Eastern District of Pennsylvania, was transferred to the Middle District of Pennsylvania in February 1989. Pet. App. 31a.

effort to control or regulate commerce with foreign countries," the court held that the Act did not intrude on the federal government's prerogatives in that area. *Ibid.*[5]

4. In October 1990, the court of appeals affirmed. Pet. App. 1a-29a. In the court of appeals, petitioners argued that "in controlling the purchases of * * * local [governmental] entities, the Commonwealth is regulating actors other than itself, thereby forfeiting market participant status" for purposes of the Commerce Clause. Pet. App. 16a-17a. In so contending, petitioners relied on *W.C.M. Window Co.* v. *Bernardi*,

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[5] The court of appeals similarly rejected petitioners' claim based on the state statute's alleged interference with the federal government's authority over foreign affairs. Pet. App. 23a-24a. Petitioners have abandoned that claim before this Court.

The district court also rejected petitioners' contentions that various provisions of federal law preempted the Pennsylvania Steel Products Procurement Act. Pet. App. 35a-36a (discussing the Free Trade Agreement, Dec. 22, 1987-Jan. 2, 1988, United States-Canada, 27 I.L.M. 281, the Agreement on Government Procurement, General Agreement on Tariffs and Trade, art. II, Apr. 12, 1979, T.I.A.S. No. 10403, the Steel Import Stabilization Act, Pub. L. No. 98-573, Tit. VIII, §§ 801-808, 98 Stat. 3043-3047 (*reprinted at* note following 19 U.S.C. 2253), the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (codified as amended in scattered sections of 5 U.S.C., 19 U.S.C., and 31 U.S.C.), and the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (codified as amended principally in 19 U.S.C. 2501 *et seq.*)). Moreover, the court rejected petitioners' claim that the Act was unconstitutionally vague. Pet. App. 36a-38a.

The court of appeals upheld the district court's rejection of petitioners' federal preemption and vagueness claims, see Pet. App. 5a-14a, 24a-28a, and petitioners have not sought further review of them. Accordingly, those claims are also not before this Court.

730 F.2d 486, 495-496 (1984), where the Seventh Circuit held that for purposes of the market participant doctrine, local political subdivisions are not part of a State.

The court of appeals rejected petitioners' contention and expressly disagreed with the Seventh Circuit's decision in *W.C.M. Window*. Pet. App. 18a-20a. It found "no compelling analytical difference between a local government unit and central state agencies." *Id.* at 18a. In the court's view, "[b]oth exist only through affirmative acts of the state. A municipality derives its authority from the state." *Ibid.* The court pointed out that under Pennsylvania law, "it is clear that the local bodies covered by the [Steel Products Procurement Act] exist only by grace of state authority and with such powers as the state affirmatively provides." *Ibid.* The court therefore could "see no reason why, attendant on making such affirmative grants of power, the Commonwealth may not also restrict the contracting authority of such local bodies." *Ibid.* Since "[i]mposing such restrictions on central state agencies would be permitted [under the market participant doctrine]," the court did "not believe restrictions on local bodies stand in any different light." *Id.* at 18a-19a.

The court of appeals also determined that "the fact that the products being excluded are of foreign origin [did not] countenance[] a different result," Pet. App. 20a, concluding that "the Pennsylvania statute survives even the most searching review [under the Commerce Clause]," *id.* at 21a (citing *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U.S. 81 (1984); *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979)). In its view, "state procurement policy fits comfortably within

[this] Court's observation that nothing in 'the Foreign Commerce Clause *insists* that the Federal Government speak with any particular voice.' " Pet. App. 21a (quoting *Wardair Canada* v. *Florida Dep't of Revenue*, 477 U.S. 1, 13 (1985)). As the court pointed out, "Congress is aware of state activity * * * to restrict procurement of foreign goods, * * * and yet has not imposed a policy of national uniformity." Pet. App. 21a (footnote omitted).

Finally, the court of appeals found "no merit in [petitioners'] claim that the Steel Act violates the equal protection clause," Pet. App. 28a, noting that this case did "not involve the taxing power and 'the Equal Protection Clause permits economic regulation that distinguishes between groups that *are* legitimately different—as local institutions so often are,' " *id.* at 29a (quoting *Northeast Bancorp, Inc.* v. *Board of Governors*, 472 U.S. 159, 180 (1985) (O'Connor, J., concurring)).

DISCUSSION

The courts below correctly rejected petitioners' constitutional challenge to the Pennsylvania Steel Products Procurement Act. That challenge is without merit in light of established principles under the Commerce Clause and the Equal Protection Clause. As petitioners point out (Pet. 8-11), however, the court of appeals' application of the market participant doctrine—in one respect—conflicts with the Seventh Circuit's approach in *W.C.M. Window Co.* v. *Bernardi*, 730 F.2d 486 (1984). That limited conflict, in our view, does not now call for this Court's review, particularly given the dearth of reported case law in this area.

1. a. Petitioners contend that the breadth of the Pennsylvania Steel Products Procurement Act, which

extends to "the activities of local municipal authorities," Pet. 8, takes the state law outside the scope of the "market participant" exception to the Commerce Clause. See Pet. 8-11. This Court has held that "when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause." *White* v. *Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 208 (1983); see, *e.g.*, *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 436-437 (1980) (upholding state law restricting sale of state-produced cement to state residents); *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976) (upholding state "bounties" for scrap cars that favored state resident claimants). That doctrine stems from the fact that "[t]here is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." *Reeves, Inc.* v. *Stake*, 447 U.S. at 437. Indeed, in light of " 'the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal,' " *id.* at 438-439 (quoting *United States* v. *Colgate & Co.*, 250 U.S. 300, 307 (1919)), the Court has reasoned that "when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause," *Reeves, Inc.* v. *Stake*, 447 U.S. at 439.

States exercise sovereign powers through various levels of state, county, and local governmental entities. And as this Court has long recognized, "the State may withhold, grant or withdraw powers and privileges as it sees fit. However great or small its sphere of action, [a local governmental entity] re-

mains the creature of the State exercising and holding powers and privileges subject to the sovereign will." *City of Trenton* v. *New Jersey*, 262 U.S. 182, 187 (1923). In view of this established governmental structure, the Court has recognized that, for purposes of applying various provisions of the Constitution, local governmental entities generally are to be treated as the States that created them. See, *e.g.*, *United Bldg. & Constr. Trades Council* v. *Mayor and Council of Camden*, 465 U.S. 208, 215 (1984) (Privileges and Immunities Clause); *Avery* v. *Midland County*, 390 U.S. 474, 480 (1968) (Fourteenth Amendment); cf. *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 111 S.Ct. 1344, 1348-1350 (1991) (municipality may claim State's Sherman Act immunity under *Parker* v. *Brown*, 317 U.S. 341 (1943)).

For purposes of the Commerce Clause as well, the court of appeals recognized, there is "no compelling analytical difference between a local government unit and central state agencies." Pet. App. 18a. This reasoning is sound. Here, the Commonwealth of Pennsylvania, acting through various governmental entities created by and subject to state law, see Pa. Stat. Ann. tit. 73, § 1886 (Purdon Supp. 1990), has exercised its prerogative in the marketplace to limit its purchases of foreign steel products. Under Pennsylvania law, as the court of appeals pointed out, "the local bodies covered by [the Steel Products Procurement Act] exist only by grace of state authority and with such powers as the state affirmatively provides." Pet. App. 18a; see *id.* at 18a n.15 (collecting cases). Indeed, municipal authorities are "independent agencies of the Commonwealth, and part of its sovereignty." *Commonwealth* v. *Erie Metro. Transit Auth.*, 444 Pa. 345, 348, 281 A.2d 882, 884 (1971).

Accordingly, the court of appeals correctly held that the Commonwealth has not forfeited its "market participant" status under the Commerce Clause by restricting the contracting authority of local governmental entities in the Steel Products Procurement Act.

b. As petitioners point out (Pet. 8-11), the court of appeals' application of the market participant doctrine conflicts—in one respect—with the Seventh Circuit's approach in *W.C.M. Window Co.* v. *Bernardi*, 730 F.2d 486 (1984). There, the court of appeals concluded that, for purposes of the Commerce Clause, "[w]hen the project on which the state impresses a home-state preference is undertaken by a unit of local government without any state financial support or supervision, the state is not a participant in the project but a regulator." *Id.* at 496. In so holding, the Seventh Circuit reasoned:

> [S]ince more public contracting in the states is done at the local level, by cities, school districts, park districts, counties, etc., than at the state level, extending [the market participant doctrine] to cases where the state's relationship to its local agencies is purely regulatory could do great damage to the principles of free trade on which the negative commerce clause is based.

Ibid.

For the reasons stated above, the Seventh Circuit's analysis in *W.C.M. Window* is mistaken. As the court below acknowledged, "[i]t may be true that local municipalities and authorities are responsible for the great bulk of sub-national public procurement." Pet. App. 19a. Nevertheless, there is "no suggestion in [this] Court's previous forays into this area that the quantum of market purchases should

affect a public entity's qualification for market participant status." *Ibid.*[6]

In our view, the conflict between the *W.C.M. Window* and the decision below does not now call for resolution by this Court. First, the sharpness of the conflict is tempered by the alternative holding in *W.C.M. Window*, namely, that the Illinois statute at issue violated the Privileges and Immunities Clause of Article IV. See 730 F.2d at 496-498. Second, in *W.C.M. Window*, the court of appeals expressly recognized that "if the State of Illinois had limited the preference law to construction projects financed (in whole or part) or administered by the state, it would be clear * * * that the law did not violate the commerce clause." 730 F.2d at 495. Here, the record is silent as to whether the sort of local public works projects at issue are either funded or administered in part by the Commonwealth. Nonetheless, in view of applicable state law, see, *e.g.*, the Pennsylvania Solid Waste-Resource Recovery Development Act, Pa. Stat. Ann. tit. 35, §§ 755.1 *et seq.*

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[6] Moreover, *W.C.M. Window* appears to be in tension with this Court's decision in *White* v. *Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983) (upholding city order requiring construction projects funded by city funds to be performed by work force consisting of 50% city residents). As the court below noted:

> If employees of a private contractor can be thought to be in relationship with the city, we think it equally clear that suppliers of a local public entity can be thought to be "supplying for the state." As the ultimately controlling public purchaser, the Commonwealth enjoys the same right to specify to its suppliers the source of steel to be used in any supplies provided as is enjoyed by similarly situated private purchasers.

Pet. App. 19a.

(Purdon 1977); the Pennsylvania Infrastructure Investment Authority Act, Pa. Stat. Ann. tit. 35, §§ 751.1 *et seq.* (Purdon Supp. 1990), such state participation is not unlikely. If such were the case, the limited conflict between the decision below and *W.C.M. Window* would be immaterial.[7]

Third, application of the market participant doctrine to local governmental entities has not been a widely litigated issue. Petitioners can point to only the decision below and *W.C.M. Window* as reaching the issue, and we are aware of no other recently reported federal or state decisions resolving, much less addressing, the matter. Cf. *K.S.B. Technical Sales Corp.* v. *North Jersey Dist. Water Supply Comm'n*, 75 N.J. 272, 293-299, 381 A.2d 774, 784-787 (1977) (upholding state "buy American" statute against Commerce Clause challenge). Finally, despite the fact that a number of States have enacted "buy-American" legislation in recent years,[8] and thus may be targets of Commerce Clause challenges, such legislation has also been the infrequent subject of reported litigation.

2. Petitioners next contend that this case presents an issue the Court reserved in *Reeves, Inc.* v. *Stake*, 447 U.S. at 438 n.9, and did not resolve definitively in *South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 93-99 (1984) (plurality opinion); *id.* at 101 (Brennan, J., concurring), namely, "whether state

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[7] It is also noteworthy that the state law at issue in *W.C.M. Window* restricted *employment* on covered projects to *state* residents, while the law at issue in this case restricts use of *materials* to those produced in the *United States*.

[8] See Pet. App. 21a n.17; R. Zee, *Purchasing Preference Practices: A 50 State Overview* 22-24 (The Council of State Governments, 1989).

buy-American legislation is safeguarded from commerce clause scrutiny by the market participant doctrine," Pet. 12. In particular, petitioners take the position that such state laws are subject to so-called "heightened foreign commerce clause scrutiny," *ibid.*, a question that this Court has also not definitively resolved, see *Reeves, Inc.* v. *Stake*, 447 U.S. at 438 n.9; *South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. at 99-101 (plurality opinion); *id.* at 101 (Brennan, J., concurring).

In our view, this case is not a suitable vehicle for addressing the questions petitioners pose. Here, the court of appeals expressly held that "the Pennsylvania statute survives even the most searching review [under the Commerce Clause]." Pet. App. 21a. That conclusion is unexceptionable on the record presented, since the court of appeals thoroughly canvassed pertinent authoritative federal law and Executive Branch activities in determining that "[s]tate procurement practices present no problems of reconciling conflicting polic[ies] among multiple national sovereigns." *Ibid.*; see *id.* at 7a-14a.

Indeed, in the context of the Uruguay Round of international trade negotiations under the auspices of the General Agreement on Tariffs and Trade (GATT), the United States and other nations are currently discussing extending the Agreement on Government Procurement, GATT, art. II, Apr. 12, 1979, T.I.A.S. No. 10403, to local, state, and regional governmental entities.[9] To date, a number of our

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[9] As the court of appeals pointed out, "the Government Procurement Agreement only purports to cover fifty-four *federal agencies*." Pet. App. 10a-11a; see also *Statement of Administrative Action*, H.R. Doc. No. 153, 96th Cong., 1st Sess. Pt. 2, at 479 (1979) ("Purchases by state and local governments are not covered since the Agreement applies only to federal agencies specifically listed.").

trading partners have offered to lower trade barriers at every level of government procurement if the United States reciprocates; those offers are being considered by the appropriate authorities in the Executive Branch. In this fluid state of affairs, the existence and enforcement of "buy-American" laws such as the Pennsylvania Steel Products Procurement Act (and their foreign counterparts)—not uncommon features on domestic and foreign legal landscapes—do not interfere with ongoing trade negotiations or hamper the federal government's conduct of foreign trade policy. Of course, if an international agreement removing such trade barriers were reached, the agreement, once adopted as federal law, would override any conflicting state laws or regulations. See *United States* v. *Belmont*, 301 U.S. 324 (1937); *Missouri* v. *Holland*, 252 U.S. 416 (1920).

3. Finally, petitioners contend (Pet. 18-22) that the Pennsylvania Steel Products Procurement Act, as a "blatant attempt[] at economic protectionism," (Pet. 18) violates the Equal Protection Clause. That claim is insubstantial. Here, the Commonwealth's distinction between domestic and foreign steel products is rationally related to a legitimate governmental purpose, namely, to encourage support for a vital but financial strapped industry that accounts for substantial local employment and tax revenue. See Pa. Stat. Ann. tit. 73, § 1883 (Purdon Supp. 1990); cf. *American Yearbook Co.* v. *Askew*, 339 F. Supp. 719, 723 (M.D. Fla.), aff'd, 409 U.S. 904 (1972) (upholding State's practice of favoring in-state publishing houses in buying school textbooks against challenge under the Equal Protection Clause).

For that reason, this case is unlike *Metropolitan Life Ins. Co.* v. *Ward*, 470 U.S. 869 (1985), where

the Court struck down the state taxing measure at issue after determining that "Alabama's aim to promote domestic industry is purely and completely discriminatory, designed only to favor domestic industry within the State, no matter what the cost to foreign corporations also seeking to do business there." *Id.* at 878. Indeed, the Commonwealth in this case has not at all outlawed the sale of foreign steel products within its borders. To the contrary, the Commonwealth has only excepted state and local governmental entities from the pool of available purchasers of such products.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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